

No. 15158

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2976

WAYNE P. KELLEY, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.
(Pages 1 to 450, inclusive)

Appeal from the United States District Court for the
District of Nevada

FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Appellee. [1]

* Page numbers appearing at foot of page of original Transcript of Record.

In The United States District Court For The
District of Nevada, Northern Division

No. 12886

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE P. KELLEY,

Defendant.

CRIMINAL INFORMATION (for violation of
Sec. 145(b), Internal Revenue Code 1939; 26
U.S.C., Sec. 145(b)).

First Count

The United States Attorney charges:

That on or about the 13th day of January, 1950, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$4,163.66 and that the amount of tax due and owing thereon was the sum of \$392.38, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$11,525.66, upon which said net

income there was owing to the United States of America an income tax of \$1,833.22. [2]

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Second Count

The United States Attorney further charges:

That on or about the 13th day of March, 1951, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1950 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$10,125.20 and that the amount of tax due and owing thereon was the sum of \$1,441.78, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$22,576.95, upon which said net income there was owing to the United States of America an income tax of \$4,833.98.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Third Count

The United States Attorney further charges:

That on or about the 15th day of March, 1952, in

the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1951 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$23,085.66 and that the amount of tax [3] due and owing thereon was the sum of \$5,658.40, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$28,102.56, upon which said net income there was owing to the United States of America an income tax of \$7,684.10.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Fourth Count

The United States Attorney further charges:

That on or about the 16th day of March, 1953, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1952 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada,

a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$38,562.68 and that the amount of tax due and owing thereon was the sum of \$13,967.98, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$45,058.42, upon which said net income there was owing to the United States of America an income tax of \$17,942.22.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

FRANKLIN RITTENHOUSE

United States Attorney

/s/ By STANLEY H. BROWN

Assistant U. S. Attorney

Duly verified.

[Endorsed]: Filed Oct. 7, 1955. [4]

[Title of District Court and Cause.]

Defendant's Requested Instruction No. 24

If a witness who could provide testimony which would be material to some issue in the case has not been called as a witness by the government, and the failure to call him has not been explained to your satisfaction, you may infer that his testimony, if produced, would be adverse to the government, since the government has the burden of proof throughout all stages of the trial.

Refused. [6]

Defendant's Requested Instruction No. 28

The defendant is charged in this case with wilfully attempting to evade and defeat his income taxes for each of the years 1949, 1950, 1951, and 1952. This offense is defined in the law as a felony. The law permits you, if you so desire, to find him guilty of certain lesser offenses which are misdemeanors, rather than finding him guilty of the felony alleged in the information. Accordingly, if you are not convinced beyond a reasonable doubt that the defendant is guilty of the felony offense alleged in the information with respect to any or all of these years, you may find him guilty of either one of the following misdemeanor offenses if you are convinced beyond a reasonable doubt that he is guilty of such misdemeanor offense. The two misdemeanor offenses, of which you may find the defendant guilty, instead of finding him guilty of the felony charge, are as follows:

(1) A wilful failure to pay his correct income tax for any of the years involved in the information, and

(2) The delivery of a false or fraudulent return to the Collector or Director of Internal Revenue with intent to defeat or evade the assessment intended to be made by the Collector or Director of Internal Revenue of the amount of tax owing by the defendant.

Sections 145(a) and 3616(a), Internal Revenue Code of 1939. Rule 31(c), Federal Rules of Criminal Procedure.

Refused. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find the defendant, Wayne P. Kelley, is guilty as charged in the First Count of the Information; is guilty as charged in the Second Count of Information; is guilty as charged in the Third Count of the Information, and is guilty as charged in the Fourth Count of the Information.

Dated this 13th day of April, 1956.

/s/ CLARENCE K. JONES,
Foreman.

[Endorsed]: Filed April 13, 1956. [8]

United States District Court
for the District of Nevada

No. 12,886

Viol. Sec. 145(b), Title 26, U.S.C.

UNITED STATES OF AMERICA

v.

WAYNE P. KELLEY

JUDGMENT AND COMMITMENT

On this 27th day of April, 1956, came the attorney for the government and the defendant appeared in person and with counsel, namely, George Lohse, Esq., and Spurgeon Avakian, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of

Count One

That on or about the 13th day of January, 1950, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$4,163.66 and that the amount of tax due and owing thereon was the sum of \$392.38, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$11,525.66, upon which said net income there was owing to the United States of America an income tax of \$1,833.22. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Two

That on or about the 13th day of March, 1951, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1950 was married, did wilfully and knowingly attempt to defeat and evade a large part

of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$10,125.20 and that the amount of tax due and owing thereon was the sum of \$1,441.78, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$22,576.95, upon which said net income there was owing to the United States of America an income tax of \$4,833.98. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Three

That on or about the 15th day of March, 1952, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1951 was married, did wilfully and knowingly attempt to defeat and evade the large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$23,085.66 and that the amount of tax due and owing thereon was the sum of

\$5,658.40, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$28,102.56, upon which said net income there was owing to the United States of America an income tax of \$7,684.10. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Four

That on or about the 16th day of March, 1953, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1952 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$38,562.68 and that the amount of tax due and owing thereon was the sum of \$13,967.98, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$45,058.42, upon which said net income there was owing to the United States of America an income tax of \$17,942.22. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

as charged in the Information, and the court having asked the defendant whether he has anything

to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of, Count 1: 2 Years and fined \$6,000.00; Count 2: 2 Years and fined \$6,000.00; Count 3: 2 Years and fined \$1,500.00; Count 4: 2 Years and fined \$1,500.00, also Costs of Prosecution to be taxed.

It Is Ordered that the imposition portions of the sentence on Counts 2, 3 and 4 shall run concurrently with each other and with Count 1, so that the total imprisonment is 2 years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN R. ROSS,

United States District Judge

OLIVER F. PRATT,

Clerk

/s/ By BERNARD SUPERAP,

Deputy Clerk

A True Copy Certified this 27th day of April,
1956.

[Seal] /s/ OLIVER F. PRATT,

Clerk

[9]

[Title of District Court and Cause.]

ORDER DENYING MOTION
FOR NEW TRIAL

Defendant's motion for new trial came on for argument this 26th day of April, 1956, Stanley H. Brown and Clyde R. Maxwell, Jr., appearing for the government, and George Lohse and Spurgeon Avakian appearing for the defendant, and said motion being fully argued, and submitted to the Court; now, therefore, after all matters presented at argument being fully considered, and good cause appearing, it is

Ordered, that the defendant's motion for a new trial be and the same is hereby denied.

Dated at Carson City, Nevada, this 26th day of April, 1956.

/s/ JOHN R. ROSS,

United States District Judge [11]

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 27th day of April, 1956, and respectfully states as follows:

(1) Appellant's name and address are as follows: Dr. Wayne P. Kelley, 275 Bret Harte Avenue, Reno, Nevada.

(2) The names and addresses of appellant's attorneys are as follows: [12] George Lohse, 40 West First Street, Reno, Nevada, telephone: Reno 2-3706; Spurgeon Avakian, Financial Center Building, Oakland 12, California, Telephone: GLencourt 2-2133.

(3) The offense of which appellant was convicted is an attempt to defeat or evade income tax for the years 1949 to 1952, inclusive, in violation of Section 145(b) of the Internal Revenue Code. The information alleged that defendant attempted to evade tax in the amount of \$10,832.98.

(4) The judgment of the Court was that defendant be fined \$6,000 on each of Counts 1 and 2, and \$1,500 on each of Counts 3 and 4, plus the costs of prosecution, and that defendant be committed to the custody of the Attorney General for a term of two years on each of said four counts, said terms to be served concurrently. Said judgment was rendered on April 27, 1956.

(5) Appellant appeals from said judgment to the United States Court of Appeals for the Ninth Circuit.

Dated this 27th day of April, 1956.

GEORGE LOHSE and
SPURGEON AVAKIAN,

/s/ By SPURGEON AVAKIAN,
Attorneys for Appellant [13]

Acknowledgment of Service Attached.

[Endorsed]: Filed April 27, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be and it hereby is extended to and including July 16, 1956.

Dated this 7th day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge [18]

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be and it hereby is extended to and including September 10, 1956.

Dated this 2nd day of July, 1956.

/s/ JOHN R. ROSS,

United States District Judge [19]

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court, or true and copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of August, 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk

In the United States District Court
for the District of Nevada

No. 12,886

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE P. KELLEY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Jury Trial

Before: Hon. John R. Ross, Judge.

Be It Remembered, That the above-entitled mat-

ter came for trial before the Court, sitting with a jury, on Monday, March 26, 1956, at 10:00 o'clock a.m., at Carson City, Nevada.

Appearances: Stanley H. Brown, Esq., Clyde R. Maxwell, Esq., Attorneys for Plaintiff. George Lohse, Esq., Spurgeon Avakian, Esq., Attorneys for Defendant.

The following proceedings were had:

Plaintiff's Opening Statement

Mr. Maxwell: The Court and counsel, ladies and gentlemen of the jury:

As the Court has already informed you, it is now my purpose to give you some idea of what the government expects to [1] prove to you in this case. Naturally, we can't take it witness by witness, but I am going to try and give you an idea of the theories of proof held by the government, so that you can see the general purport of the witnesses' testimony as they are on the stand. You should know where his testimony fits in the general picture. When I finish, counsel for the defendant will have an opportunity to make his opening statement to you, or if he sees fit, he may reserve that until the opening of the defendant's case.

As the Court has already inferred, the statements of a lawyer on either side of this case are not evidence and they are not to be considered by you as such. If any of the statements that I make, or that defendant's attorney makes, conflicts with your understanding of what the evidence is, then you should take your understanding of the evidence.

Now as the Court has already informed you, this is a criminal case. As members of the jury in this case, you have a duty to perform. You have sworn to an oath to do that duty. Your job is not an easy one and it involves a careful consideration, not only of the facts that the government will present to you for two or three weeks, but the information that the defendant presents to you. As told you, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, at which time the presumption of innocence disappears. The Court will instruct you fully as to the meaning of the [2] words "reasonable doubt." I think it suffices for the moment to say it is not a fanciful doubt, but it is a substantial real doubt. Now this case is a criminal income tax case. The payment of taxes is not relished by any one. When April 15th rolls around, nobody likes very much to pay taxes, but we all do it and the government receives its revenue. If we didn't do it, the government wouldn't receive its revenue.

Mr. Avakian: Your Honor please, I object to argument at this time.

Mr. Maxwell: If the Court please, I am simply trying to put in a little background for use of the jury. I understand this man has not so far been called and I think the Court and counsel should indulge me a little bit on that. I will try not to wander too far afield.

The Court: Counsel, the specific purpose is to outline the case from the standpoint of testimony.

The Court will go along with you. The objection is overruled.

Mr. Maxwell: As a matter of fact, in my outline I had concluded that particular phase.

Now in this case you have heard the clerk read the indictment. It charges an intent to evade and defeat taxes on the part of the defendant for the years 1949 to 1952. The indictment says that during those times, one for each year, 1949 to 1952, that he filed returns in each one of those years, on which [3] he understated his income and his tax. Now you probably recall also for 1949 it said the return showed approximately four thousand dollars income, when then and there well knew it should have been \$11,500, in round figures, and that the return which was filed showed approximately \$400 taxes, when it should have shown about \$1800 taxes. Now I am going to try to let the figures go for the present. The figures in the indictment need not be proven exactly by the government. All that is necessary to sustain an indictment means that a substantial amount of income be left off.

In this case the defendant, who is charged with income tax evasion, we are, of course, concerned with what was on his return, but more so we are interested in finding out what is the difference between avoidance and evasion of income tax. If the defendant here merely sought to avoid his taxes, he is not guilty; if he attempted to evade his taxes, he is guilty. I would like to give a little example of the difference between the two. Suppose that a man has six thousand dollars net income for a year.

Probably we are all familiar with the fact he has three different ways to compute the taxes. He could take the standard deductions. He chooses the one which produces the least tax, we will say \$400, out of the three, possibly one is \$445, another \$415, but he chooses the one that is the least. Now there is nothing wrong with that. You and I do it all the time, but if the [4] same man, instead of putting six thousand dollars net income down on his return, only shows four thousand dollars, well knowing he had six thousand, and shows his tax is only three hundred, that then would be tax evasion.

In a tax evasion case, the government has to prove unreported income for each year charged in the indictment. The government has to prove the intent, that is, the knowledge and the purpose necessary to show that this defendant deliberately attempted to evade the taxes. In short, the government has to show that the defendant knew he left off income from his return and knew if he put it in his return, he would have had to pay more taxes, or in the case of the exemptions, the government would have to show that the defendant claimed exemptions on his return to which he was not entitled. Furthermore, the government would have to show that the defendant knew he was not entitled to that expense. For example, if the defendant claimed business expense for an airplane, yet used that airplane for personal purposes, and the government could show he put that down on his return, well knowing he was using it for personal purposes and not for business purposes, then that would tend to understate his income and be tax evasion.

Now let us come down to some specific figures in this case. What is the government going to show you on the income of the defendant? The defendant is a practicing doctor and surgeon. During the years 1949 to 1952 he had many patients. [5] Some 1100, I believe, in Reno. We are going to present to you testimony of approximately 100 patients, who will testify as to amounts paid to the doctor during the years 1949 to 1952. Now 100 witnesses themselves on that same line may be a little bit boring. It is the only way the government has of bringing proof to of payments which were made. We will also show what payments were recorded on the records of Dr. Kelley. The plaintiff made a transcript of the records available to it.

Then the third thing we will show, of course, is the income on the income tax returns. We will show to you that that was prepared, income was computed from the duplicate bank deposits which the doctor kept, and receipts, with a small additional amount of what we will call unidentified receipts, that we could not tie down to any particular patient. We will show to you the transcript of the patient cards kept by the doctor and the entry on the patients' cards as being paid. Now outside of the duplicate deposit slips, the cash receipt books, patient cards, those are the only books Dr. Kelley ever showed to the Revenue agents. I think the evidence will produce, in a capable manner, that Dr. Kelley has other and more complete records.

Now as an example of the patient's testimony, let us take Mrs. Johnson. The government will show in the year 1949 the deposit slips do not show any re-

ceipts from Mrs. Johnson, as being received from Mrs. Johnson. The patient card has entry [6] as being received from Mrs. Johnson. Mrs. Johnson has cancelled check showing \$317 paid to the doctor for the year 1949 by check; showing that checks had been cashed in 1950. He reported deposit, patient card, \$75.00 charged, but Mrs. Johnson will testify paying \$25 in cash and \$185 in checks. In 1951 nothing in the deposits. The patient card will show \$75 Mrs. Johnson paid. Mrs. Johnson will testify she paid \$110 in cash, has a receipt. On the patient card \$150. This was a source of reported income—cash \$110, checks \$502, total paid \$612.

Now besides the testimony of the patients as to individual fees paid Dr. Kelley, the government will show to you that Dr. Kelley prepared his own return and claimed on his returns expenses for depreciation, flew his own plane, he flew to a couple of conventions. We will show you, by and large here, when you purchase for pleasure, as you are well aware, I am sure, you can't deduct expenses for your personal pleasure vehicles, your automobile or your airplane.

Now in order to perhaps further show you the income of Dr. Kelley for these years, the government is going to show you his income as computed on the net worth and expenditures basis. Now that is a long term. It really isn't as bad as it sounds. What you do, in effect you take what a man has at the beginning of the year and subtract that amount from what he has at the end of the year. If you have more at the end of the year, you come up with

your net increase. You add to that expenses [7] and that gives your net income. Let me give you a very brief example of the net worth system which the government will attempt to use. Put down in this column (illustrating on blackboard) beginning of year 1949, end of year 1949. A man will have a bank account, a house, an automobile, other things perhaps that will come up at the beginning of the year. At the end of the year we will say that these assets he has are thirty thousand dollars, and he has liabilities, notes, or mortgage on his house, at the end of the year ten thousand dollars. By subtracting his liabilities to get his net worth; net worth at beginning of 1949 would be five thousand dollars, at the end of 1949 would be twenty thousand dollars. It looks like he had a net worth increase of fifteen thousand dollars during that year. Well now to that you have to add the living expenses. They will have been spent for food, clothing, and say it costs him four thousand dollars per year to live, and he also pays some taxes, which aren't in here either, say he paid four hundred dollars taxes during the year, so it looks like he will come up to \$19,400 on the net worth system. What does he report on his return? Well, he reported only ten thousand dollars on his return. It looks like he had nine thousand dollars unreported income somewhere. And that is what we are going to show you with respect to Dr. Kelley for the years 1949 to 1952. We think we will be able to show you by that result, not only did he have unreported income, which the patients will testify to, but that [8] he had much more which we didn't

know about. We will be able to show you that he had many more patients than the government puts here in evidence.

Now besides proving of income, as I told you, the government is going to have to produce evidence of Dr. Kelley's intent, wilful intent, to evade and defeat his taxes. Now how do we do that? How do you know whether you, or anybody else filed a false return with intent to evade and defeat their taxes? They don't come up and tell you or I about it. They prepared the return and mailed it and no one ever sees it except the person making out his return and the United States government. Now how do they prove that the defendant's intention was to evade taxes? Well, the Court will instruct you we have to do this by judging what his intentions were at the time he performed the various acts that he did perform. You have to judge by his actions, since we have no other way to do it. The easiest way to do this is just to say, "What would I have been doing if I had done such and such an act; why would I have been doing this? Perhaps one little thing all by itself does not mean much, but then the next act, the next act, the next act, all shape up together to determine what was Dr. Kelley's intention at the time he filed his returns. We are going to show you a number of acts which we believe, and earnestly contend, will show the defendant's intention to evade and defeat his taxes.

First of all I am going to call to your attention, we [9] will show that the defendant prepared these detailed returns by himself. He had some pretty in-

volved activities which required a pretty good knowledge of the income tax law. The doctor held assets. We are going to show what these assets were in the net worth statement. We are going to show you how many years that these assets were in the names of other people, and as the Court will instruct you, that is one of the acts that you can consider in connection with determining Dr. Kelley's intention.

The government will show that there were some records destroyed by Dr. Kelley.

The government will show that Dr. Kelley handled his ordinary affairs to avoid making the records which are usual in transactions of a business. The government will show that the defendant, in all probability, kept his second set of correct books, which we have never seen. The government will also show you methods the doctor used to keep his records in the office, how these were not made to the proper records and how checks were cashed and how payments made in cash went into the doctor's pocket. We will also show you that when first approached by the Internal Revenue agents to explain rather large wealth and rather meager record of income in his income tax return, that the doctor came out with a very fantastic story of fabulous amounts while——

Mr. Avakian: These words, "fabulous" and "fantastic" are argument. [10]

The Court: I have instructed the jury, and I now instruct them again, that argument of counsel does not amount to evidence and they may both be

carried away in argument, so have that in mind.

Mr. Maxwell: We will show them Dr. Kelley was not able to explain his assets. In short, ladies and gentlemen, what we are going to try to do might be a little bit tedious and long-winded, but we have to do it that way to show to you that Dr. Kelley had very large amounts of money and that they were not reported and that they were not reported deliberately, in an attempt to evade and defeat income taxes that he knew he owed to the government. Thank you.

(Recess taken at 2:55 until 3:10 p.m.)

3:10 p.m.

Defendant and counsel present in court. Presence of the jury and alternate jurors stipulated.

Mr. Maxwell: May it please the court, we have a stipulation that has been entered into between the government and the defendant, as to the income tax returns of the defendant for the various years. I will first ask to have marked a document which contains both the 1942 and 1943 income tax returns of the income of Wayne Kelley, and it is stipulated between the government and the defendant that that document is an income tax return for those years, 1942 and 1943.

The Court: You are offering it in evidence, pursuant [11] to the stipulation or for identification?

Mr. Maxwell: I will offer it in evidence at this time.

Mr. Avakian: Your Honor, we have no objection

to any of the income tax returns which Mr. Maxwell has shown to us, if it will save time.

The Court: Very well, the offer will be received in evidence as government's Exhibit 1.

Mr. Maxwell: Then next the return of Wayne P. Kelley for the year 1946. I ask that that be marked as government's exhibit next in order.

The Court: It will be so marked, government's Exhibit 2.

Mr. Maxwell: Next the return of Mrs. Lois K. Kelley for the year 1946.

The Court: The offer will be received in evidence as government's Exhibit 3.

Mr. Maxwell: The return of Wayne P. Kelley for the year 1947.

The Court: The offer will be marked government's Exhibit 4 in evidence.

Mr. Maxwell: The income tax return of Mrs. Lois K. Lekkey for the year 1947.

The Court: The offer will be received in evidence as government's Exhibit 5.

Mr. Maxwell: The income tax return of Wayne P. and [12] Lois K. Kelley for the year 1948.

The Court: The offer will be received in evidence as government's Exhibit 6.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1949.

The Court: The offer will be received in evidence as government's Exhibit 7.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1950.

The Court: The offer will be received in evidence as government's Exhibit 8.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1951.

The Court: The offer will be received in evidence as government's Exhibit 9.

Mr. Maxwell: And the return of Wayne P. and Lois K. Kelley for the year 1952.

The Court: The offer will be received in evidence as government's Exhibit 10.

Mr. Maxwell: I have next a Certificate of Assessment showing taxes paid for the years 1942 to 1947 inclusive. It is stipulated between defendant and the government that this certificate is a transcript of the records of the Director of Internal Revenue in the office of the District Director of Internal Revenue at Reno. [13]

The Court: The offer will be received in evidence as government's Exhibit 11.

Mr. Maxwell: Next document is Certificate of Assessment and payments, showing tax paid as to years 1948 to 1952 inclusive. It is also stipulated between defendant and the government that this document is a transcript of the Collector's records, showing payments for those years.

Mr. Avakian: May I ask counsel if correction has been made on it that he mentioned to us?

Mr. Maxwell: It has.

The Court: The offer will be received in evidence as government's Exhibit 12.

Mr. Maxwell: As exhibit next in order, I have Certificate of Assessments and payments, showing

amounts paid by Dr. Wayne P. Kelley on the records of the District Director at Syracuse, New York for the years 1932 through 1941 inclusive.

The Court: The offer will be received as government's Exhibit 13 in evidence.

ARTHUR W. JOHNSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, your name is Arthur W. Johnson?

A. That is right.

Q. And you have been previously sworn in this matter have you [14] not? A. That is right.

Q. Where do you reside, sir?

A. Reno, Nevada.

Q. And you have resided in Reno how many years, to the best of your recollection?

A. Fifteen years.

Q. What is your occupation or profession?

A. Assistant cashier of the Security National Bank of Reno.

Q. How long have you been employed by the Security National Bank? A. Nine years.

Q. Briefly what do your duties consist of?

A. Finance personnel.

Q. You appeared here today pursuant to subpoena issued by me, did you not?

A. That is correct.

Q. When you were served with subpoena, you

(Testimony of Arthur W. Johnson.)

were also served with subpoena ducas tecum, requesting you to bring certain original records?

A. Yes, sir.

Q. Do you have those records with you?

A. Yes.

Q. Did you bring with you two signature cards of Phyllis I. Kelley on the Phyllis I. Kelley account? [15]

A. Yes.

Q. Did you also bring with you a ledger sheet pertaining to the savings account of Phyllis I. Kelley, account 5192?

A. I did.

Q. May I have it please? Did you also bring with you certain deposit slips, pertaining to deposits made in that account by Phyllis I. Kelley?

A. Yes.

Q. May I have them please? Did you also bring with you a collection ticket, which is collection ticket No. 160, showing a deposit by Lois K. Kelley, drawn on account of Usabel Cobb?

A. Yes, I did.

Q. Did you also bring with you savings withdrawal ticket dated July 15, 1950, in the amount of \$8,896.21, together with a check drawn payable to the order of Phyllis I. Kelley in the same amount?

A. Yes, I did.

Q. May I have it. You have also heretofore caused certain photostatic copies to be made and you have delivered them to me, have you not?

A. Signature card.

Q. Those records you have handed to me were kept in the ordinary course of business as a bank-

(Testimony of Arthur W. Johnson.)

ing institution by the Security National Bank, were they not? A. That is right. [16]

Q. They were kept under your direction and control at the bank, is that correct?

A. That is correct.

Mr. Brown: We offer the ledger sheet No. 5192 as plaintiff's Exhibit next in order.

Mr. Lohse: There is no objection to its admission, your Honor.

The Court: The offer will be received as government's Exhibit 14.

Mr. Brown: We offer the signature cards of Phyllis Irene Kelley and Phyllis I. Kelley on account No. 5192, as plaintiff's exhibit next in order.

Mr. Lohse: No objection, your Honor.

The Court: The offer will be received as government's Exhibit 15. There are two cards?

Mr. Brown: The two cards are stapled together, your Honor. We offer the deposit slips for May 5, 1948, May 7, 1948, May 14, 1948, May 17, 1948, July 15, 1948, September 23, 1948, November 24, 1948 and February 15, 1950 as one exhibit, plaintiff's exhibit next in order.

Mr. Lohse: We have no objection, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 16.

Mr. Brown: We offer the collection slip No. 160 as plaintiff's exhibit next in order. [17]

Mr. Lohse: No objection your Honor.

The Court: It will be received in evidence as government's Exhibit 17.

(Testimony of Arthur W. Johnson.)

Mr. Brown: We offer the savings withdrawal ticket together with check 24224, in the amount of \$8,806.21, payable to Phyllis I. Kelley, as one exhibit, plaintiff's exhibit next in order.

Mr. Lohse: There is no objection, your Honor.

The Court: The offer is admitted in evidence as government's Exhibit 18.

Mr. Brown: At the conclusion of the testimony of this trial, we will move the Court for an order to substitute photostatic copies in lieu of the originals.

Mr. Lohse: We would be willing that be done whenever the government chooses.

Mr. Brown: We would prefer to wait. You may examine.

Mr. Lohse: No cross-examination of the witness, your Honor.

(Witness excused.)

ERNEST MARTINELLI

a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): You have been previously sworn? A. Yes.

Q. State your name. [18]

A. Ernest Martinelli.

Q. Where do you reside?

A. Sparks, Nevada.

Q. What is your occupation? A. Banker.

Q. What position do you hold?

(Testimony of Ernest Martinelli.)

A. Assistant cashier, finance officer, First & Virginia Branch First National Bank of Nevada.

Q. And in your capacity as Assistant Cashier, do you have the care, custody and control of records of the First National Bank of Reno? A. Yes.

Q. Mr. Martinelli, you have been asked to bring here today certain records of the First National Bank of Reno, namely, first, records pertaining to the account of Lois K. Kelley, savings account 6034, for the period of the account, including the ledger sheets, signature cards and deposit slips. Do you have those records? A. I do.

Q. May I have them please? I see you have handed me three signature cards. Would you tell me what those cards are, please?

A. This signature card is on the savings account No. 6034, Lois K. Kelley. These other two signature cards are the prior savings account.

Q. And in what name are those? [19]

A. Lois W. Kays.

Mr. Maxwell: We will offer the second cards described as government's exhibit next in order.

Mr. Avakian: We have no objection to the first card. We object to the two prior cards because we do not see the materiality.

The Court: First card will be received in evidence as government's Exhibit 19 and the other two cards will be marked Exhibit 19(a) for identification.

Q. Now, sir, you have given me what appear

(Testimony of Ernest Martinelli.)

to be deposit slips. Can you tell me what those are, sir?

A. Yes, these are deposits to the savings account No. 6034 in the name of Lois I. Kelley.

Q. Can you tell approximately for what period they extend?

A. August 1, 1946 to April 22, 1948.

Mr. Maxwell: I ask that these be marked for identification at this time, your Honor.

The Court: The offer will be marked Exhibit 19(b) for identification.

Q. And you have handed me two ledger sheets. Can you tell me what those are, sir?

Q. These are ledger sheets pertaining to savings account No. 6034 in the name of Lois K. Kelley, August 1, 1946 up to May of 1948. [20]

Q. Does it show the accounts have been closed out on May 4, 1948? A. Yes, they have.

Mr. Maxwell: May these be marked as government's exhibit for identification next in order?

The Court: They will be marked Exhibit 19(c) for identification.

Q. Mr. Martinelli, you were also asked to bring the records of the First National Bank of Reno pertaining to the account of Wayne P. Kelley or Lois K. Kelley, savings account No. 10927, for the period 5-4-48 to 12-31-52 inclusive, including ledger sheets, signature cards and deposit slips. Have you brought those records for us? A. Yes.

Mr. Maxwell: May I have the signature cards on that account. We will offer what appears to be

(Testimony of Ernest Martinelli.)

signature of Wayne P. Kelley, M.D. or Lois K. Kelley, account No. 10927, and ask that they be marked government's exhibit next in order. I will offer it in evidence.

Mr. Lohse: No objection.

The Court: The offer will be received in evidence as government's Exhibit 20.

Q. Mr. Martinelli, did you bring the deposit slips on the savings account No. 10927, in the name of Wayne P. Kelley and/or Lois K. Kelley?

A. Yes. [21]

Q. May I have them? Over what period do these extend, sir, as far as you can tell?

A. May 13, 1948 to December of 1952.

Mr. Maxwell: I ask that these deposit slips be marked as government's exhibit next in order and offer them in evidence.

Mr. Avakian: We have no objection to those relating to the four years involved in the indictment here, but we do object to the earlier years. They are irrelevant and immaterial. In connection with those to which we have no objection, I suggest that they be listed in chronological order before they are stapled here. I see that they are not in chronological order.

Mr. Maxwell: I believe they were in chronological order. I have no objection to having them resorted. But as to the prior year, as to the period from May to December, 1948, I think that will have a bearing on the beginning net worth.

Mr. Avakain: The bank balance at the end of

(Testimony of Ernest Martinelli.)

1948 would have a bearing on the beginning net worth, but individual deposits made during the year would have no bearing on the net worth at the end of the year.

Mr. Maxwell: I think that would have a distinct bearing.

The Court: Objection overruled. They will be received in evidence as government's Exhibit 21.

Q. Mr. Martinelli, did you also bring the ledger sheets on the savings account No. 10927? [22]

A. Yes.

Q. For what period are those ledger sheets?

A. May 4, 1948 to April 13, 1953.

Q. Is there a statement on there as to the balance at the end of the year 1952? A. Yes.

Mr. Maxwell: And can the balance of the ledger sheet be deleted?

Mr. Avakian: If we may see it, your Honor, we may have no objection.

Mr. Maxwell: Except as to entries of the year 1953, I will offer the ledger sheets as described, in evidence.

Mr. Avakian: We would object to that portion which relates to the period prior to 1949 and 1948. As to the balance, we have no objection to the offer.

The Court: Same ruling. The exhibit will be received as government's Exhibit 22.

Q. Mr. Martinelli, you were also asked to bring records pertaining to the commercial account of Wayne P. Kelley and/or Lois K. Kelley, for the

(Testimony of Ernest Martinelli.)

period January 1, 1949 to December 31, 1952. Have you brought those documents? A. Yes.

Mr. Maxwell: Would you give me the signature card for that account, please? I will offer the signature card on the commercial account of Wayne P. Kelley and Lois K. Kelley. [23]

Mr. Avakian: No objection to its admission, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 23.

Q. Did you bring the deposit slips on that commercial account, Mr. Martinelli? A. Yes.

Mr. Maxwell: I will offer the deposit slips on the account for the period January, 1949 to December, 1952.

Mr. Avakian: Your Honor, there would appear to be one or two hundred of these. We have not had an opportunity to see these before. Would it be possible to defer the admission of these until perhaps tomorrow?

The Court: In order to keep the thing in order, I think we should admit it, subject to the objection. The offer will be admitted as government's Exhibit 24.

Q. Do you have the ledger sheets for the commercial account of Dr. Kelley? A. Yes.

Q. What period do the ledger sheets cover, please?

A. May of 1948 to January 28, 1953.

Q. Is there a place on there showing the balance as of December 31, 1948? A. Yes, there is.

(Testimony of Ernest Martinelli.)

Mr. Maxwell: That is on the second ledger sheet. We will offer the balance of the sheets only, showing balance on December 31, 1948, to and including showing balance on December 31, 1952. It can be deleted if counsel desires.

Mr. Lohse: No objection.

The Court: The offer will be received as government's Exhibit 25.

Q. Mr. Martinelli, you were asked to bring certain records with respect to the account in your bank of Wilson, Johnson & Higgins, Reno, Nevada, for the period beginning January 1, 1950, to and including December 31, 1951, including ledger sheets and deposit slips for the following dates: June 21, 1950, July 21, 1950, July 28, 1950, September 22, 1950, October 16, 1950, April 2, 1951, March 20, 1951, April 16, 1951, May 16, 1951, March 30, 1951. Did you bring those records? A. Yes.

Q. May I have the deposit slips for that account?

Mr. Maxwell: I will offer, and ask to be marked for identification at this time, the deposit slips of Wilson, Johnson & Higgins.

The Court: The offer will be received for the purpose of identification and marked government's Exhibit 26.

Q. Did you also bring the ledger sheets on that account, sir? A. Yes. [25]

Q. That is for what period, sir?

A. March 17, 1950 through November 22, 1952.

Mr. Maxwell: I ask that these ledger sheets be

(Testimony of Ernest Martinelli.)

marked for identification as government's Exhibit 26(a).

The Court: They may be so marked.

Q. Mr. Martinelli, you were also asked to bring records pertaining to cashier's check No. 20101, dated November 24, 1948, for five thousand dollars, payable to Lois Kelley, including application for cashier's check. Did you bring those, the application and cashier's check? A. Yes.

Mr. Maxwell: I will offer application for cashier's check and a check, payable to Lois K. Kelley, for five thousand dollars, and dated November 24, 1948.

Mr. Avakian: We object to this on the ground it lies outside the period covered by the indictment. I do not see its materiality.

Mr. Maxwell: I think we should be permitted to put in foundation documents.

Mr. Avakian: I do not see what the purchasing of a cashier's check on November 24, 1948 has to do, your Honor, with the question of the income for the years 1948 to 1952.

Mr. Maxwell: Don't you think it has any relation to cash on hand December 31, 1948?

The Court: The offer will be received and marked government's [26] Exhibit 27.

Q. Mr. Martinelli, you were also asked to bring records relating to cashing certain war bonds on March 5, 1951, \$1500, and on May 16, 1951, in amount of \$6,667.50, by Wayne P. Kelley or his wife, Lois K. Kelley, or both. Did you bring those

(Testimony of Ernest Martinelli.)

records? A. Only partially.

Q. What did you bring?

A. The two bonds which you mentioned cashed on March 5, 1951.

Q. What is the amount?

Mr. Avakian: We object, they are not offered in evidence.

Mr. Maxwell: I am trying to identify them.

Q. Do you have records for the sale or cashing of war bonds on March 5, 1951? A. Right.

Q. In the amount of \$1500?

A. Not exactly.

Q. How much? A. Well, \$1590.

Q. Now, Mr. Martinelli, the records that you have handed me appear to be photostats or pictures. Can you explain what they are? Are they original records or copies of original records?

A. They are copies of original records. The records we have are filmed. The bonds which are cashed are filmed. The film is kept as our record, the original is forwarded to the Federal [27] Reserve Bank.

Q. Are these documents which you have presented to me, are they film?

A. They are photographs taken from films.

Mr. Avakian: Your Honor, we have no objection to the authenticity of these records.

Mr. Maxwell: I will offer what appear to be two photostats of records showing bonds cashed on, I believe March 5, 1951, as government's exhibit next in order.

(Testimony of Ernest Martinelli.)

Mr. Avakian: No objection.

The Court: The offer will be received in evidence as government's Exhibit 28, the two photostats received as one exhibit.

Mr. Maxwell: Yes, your Honor.

Q. Now, Mr. Martinelli, did you bring records of cashing of bonds on May 16, 1951?

A. I have four, four cashed that day.

Q. But that is not a complete set of documents for cashing bonds that day? A. No.

Q. Do you have the remaining documents?

A. They are being processed right now.

Q. And you have not received them? A. No.

Mr. Maxwell: Will counsel stipulate that they may be [28] put in as part of the exhibit to be marked and numbered?

Mr. Avakian: We would be happy to do that.

The Court: What date does this refer to?

Mr. Maxwell: Refers to bonds cashed on May 16, is that correct?

The Court: 1948?

Mr. Maxwell: 1951. I will offer these as government's exhibit next in order, with the proviso that the offer may be attached to the other portions, to the same exhibit and numbered the same when received from the bank.

Mr. Brown: I might explain to your Honor the bank ran out of photostat paper.

Mr. Avakian: No objection.

The Court: The offer will be received in evidence as government's Exhibit 29, with the understanding

(Testimony of Ernest Martinelli.)

that additional photostats showing bonds cashed upon the same date may be added to the exhibit.

Q. Now, Mr. Martinelli, you were also asked to bring deposit slips on the account of Wayne P. Kelley? A. Yes, sir.

Q. Have you been able to locate them?

A. No.

Q. Mr. Martinelli, you have also presented to me photostats of these documents that you have presented here today, and the government will ask that these photostats be substituted for [29] the original documents after the verdict is returned in the case.

Mr. Avakian: We will be glad to stipulate to that, your Honor.

Mr. Maxwell: Does the Court desire to have these photostats marked for identification?

The Court: They are not offered yet. What has the Court to do with them?

Mr. Maxwell: You may examine.

Mr. Avakian: No cross examination.

(Witness excused.)

ROBERT M. ERICKSON

a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, will you state your full name?

A. Robert M. Erickson.

(Testimony of Robert M. Erickson.)

Q. You have been previously sworn in this matter? A. Yes.

Q. Where do you live?

A. 610 California Avenue, Reno.

Q. You have lived there how long?

A. Since 1935.

Q. What is your occupation?

A. Manager of the Washoe Title Insurance Company.

Q. How long have you been manager? [30]

A. Three years.

Q. And you were employed by the Washoe County Title Insurance Company for many years prior to that, is that correct? A. Yes, it is.

Q. Briefly, what do your duties consist of?

A. Manager and vice-president.

Q. You appear here pursuant to a subpoena issued by me, do you not? A. Yes, sir.

Q. And you were also served with subpoena duces tecum to bring certain records, is that correct? A. That is correct.

Q. Did you bring the records of your company, including receipt and disbursements ledger pertaining to Escrow No. 562B? A. Yes.

Q. Do you, in your records, have a letter in the nature of escrow instructions, signed by Wayne P. Kelley, addressed to R. Redelius, Realtor, agent for R. Coon of Reno, dated August 4, 1947?

A. Yes.

Q. May I have it please. Do you, in connection with that file, have your instructions and receipt

(Testimony of Robert M. Erickson.)

for money, being application No. 35924, pertaining to escrow 562B, dated August 12th of 1947, signed by Winfield O. Kelley? A. Yes. [31]

Q. May I have it? Did you bring with you your ledger sheet, pertaining to Escrow No. 562B, showing receipts and disbursements from your receipt and disbursements ledger? A. Yes.

Q. May I have that? Mr. Erickson, did you remove this from the original ledger? A. Yes.

Q. Did you bring application for title insurance No. 35924, dated September 2, 1947? A. Yes.

Q. Mr. Erickson, these records were kept in the ordinary business of the Washoe Title Insurance Company? A. Yes.

Q. And it is customary to keep such records pertaining to escrow instructions, is it not?

Q. That is correct.

Q. Do you have other papers in that file, Mr. Erickson? A. Yes, there are other papers.

Q. Pertaining to that escrow? A. Yes, sir.

Mr. Brown: I wonder if I may see them.

Mr. Avakian: We have no objection, your Honor.

Mr. Brown: We will offer the described documents, your Honor, as one exhibit, plaintiff's exhibit next in order.

The Court: These are all documents referring to [32] Escrow 562B?

Mr. Brown: 562B.

The Court: The offer will be received in evidence as government's Exhibit 30.

Mr. Brown: We have photostat copies of those

(Testimony of Robert M. Erickson.)

records and at the conclusion of the trial, we will move that the original be withdrawn and returned to the Washoe County Title Insurance Company and photostats be substituted. You may inquire, Mr. Lohse.

Cross Examination

Q. (By Mr. Lohse): Mr. Erickson, as part of this exhibit, there is an account, showing the account stands under the name of Winfield O. Kelley and wife, is that correct? A. Yes, sir.

Q. Can you tell from the receipt on this ledger sheet from whom the cash was received that is reflected in this account?

A. The thousand dollar item appears to be a check given to Mr. Redelius and one of the other entries on the credit side of the ledger, the monies received, the \$5,992.64, appears to be the same, a check.

Q. And what is the next entry?

A. \$12,807.30; appears to be in the form of a check, being 50-750 and I would say that was probably submitted by Mr. Kelley.

Q. What is the next? A. \$5200.

Q. Does your title policy show, which is attached to this exhibit, [33] in whose name the title of that property was insured, after you received that money, of \$25,000 for this account?

A. The name is Winfield O. Kelley, a married man.

Q. That is on your policy No. 35924?

A. That is right.

(Testimony of Robert M. Erickson.)

Q. When did you say that policy was issued, Mr. Erickson? A. September 2, 1947.

Q. You knew, as a matter of fact, that this residence was actually that of Dr. Wayne P. Kelley, did you not? A. No.

Q. You weren't familiar with it? A. No.

Mr. Brown: That doesn't establish that he had no personal knowledge of the transactions.

Mr. Lohse: That's all.

Redirect Examination

Q. (By Mr. Brown): With reference to the policy of title insurance in the amount of \$25,000, insuring Winfield O. Kelley, does it show that Winfield O. Kelley was a resident of the City of Reno?

A. It states on the face of the policy.

Mr. Brown: That's all.

(Witness excused.)

GLENN E. DREW

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [34]

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, sir? A. Glenn E. Drew.

Q. Have you been previously sworn, Mr. Drew?

A. Yes, sir.

Q. Where do you reside, Mr. Drew?

A. 936 Ralston, Reno, Nevada.

Q. What is your occupation?

(Testimony of Glenn E. Drew.)

A. Assistant manager Nevada Credit Rating Bureau.

Q. Reno, Nevada? A. Yes, sir.

Q. You were asked to bring with you any records that you may have respecting collection services for the account of Wayne P. Kelley for the years 1949 to 1952, including cancelled checks payable to Dr. Kelley, amount paid to you for your commissions. Did you bring those records?

A. Yes, sir.

Q. May I have the checks, and what is the form of the records?

A. They are ledger sheets which I run through a bookkeeping machine and on which information the checks are issued.

Q. And the ledger sheets have a number of names on them. Can you tell me what those names mean, in general?

A. It means in this case we collected from this party this amount charged in the information column and the balance due is the amount owed. [35]

Q. And these ledger sheets run for what period, sir?

A. Actually I have the ledger sheets here for 1948 to 1954 to cover the period specifically to 1949.

Q. What period do the checks cover?

A. The checks cover from August, 1949 also to 1952. I do not have the checks for the first part of 1949, inasmuch as there was a change of ownership and the former owner was unable to locate the checks. I couldn't locate every one.

(Testimony of Glenn E. Drew.)

Q. Do the ledger sheets reflect the date paid?

A. They do.

Mr. Maxwell: I will offer the checks as government's exhibit next in order and the ledger sheets to follow. The ledger sheets are not offered for the writing on the ledger sheets for the period September 30, 1948 and for the period after September 30, 1952 are not offered.

Mr. Avakian: Your Honor, may I make this suggestion: The exhibits have quite voluminous detail. We won't be able to tell whether we want to cross until we examine each item. Would it be possible to have these marked for identification and released to our custody over night, so we may make that examination? Does counsel have any objection?

Mr. Maxwell: I have no objection to counsel examining the exhibits or withdrawing them, so far as that is concerned, [36] but I think the documents have been sufficiently identified by the witness to be material and should be admitted in evidence.

Mr. Avakian: We are in the position, your Honor, of not knowing whether we want to object until we examine the exhibit.

The Court: I believe you are entitled to examine the offer and the offer will be received and marked for the purpose of identification Exhibit 31 for the checks and 32 for the ledger sheets, for identification.

Mr. Avakian: Do I understand they will be released to us over night?

(Testimony of Glenn E. Drew.)

The Court: That is my understanding, if counsel so stipulate.

Mr. Maxwell: Yes, your Honor. It is my understanding counsel may desire to cross examine this witness.

Mr. Avakian: Yes, there may be some cross examination later. Are you through?

Mr. Maxwell: I believe so, your Honor. We might take a little more evidence if they were in evidence.

(Witness excused temporarily.)

(Jury admonished and recess taken at 4:30 P.M.) [37]

Tuesday, March 27, 1956, 10:00 A. M.

Defendant present with counsel.

Presence of the jury stipulated.

The Court: It is the Court's recollection at the close of yesterday's session, there were two exhibits offered that were marked for identification, No. 31 and No. 32, and it was for the purpose of permitting defendant's counsel to examine those items and make any objections to the offer of those exhibits in evidence. Is that right, gentlemen?

MR. DREW

resumes the witness stand on further

Direct Examination

Mr. Maxwell: Your Honor, at this time I renew my offer to put in evidence the checks and ledger sheets of the Nevada collection agency.

(Testimony of Glenn E. Drew.)

Mr. Avakian: Your Honor, may I say preliminarily that your Honor had extended me the courtesy of reserving the right to move to strike Exhibit 24, which was a voluminous group of deposit slips of the personal account of Dr. Kelley, and having had opportunity to examine them during the recess, I want to say that we have examined them and we are satisfied with them, so the record may be clear on them.

The Court: No objection as to Exhibit 24?

Mr. Avakian: That is right. Then in respect to the [38] proposed Exhibits 31 and 32 for identification first of all, with respect to Exhibit 31, which is a group of cancelled checks, the last check in this group is dated in May of 1954 and next to the last one is dated March, 1953, both of which are beyond the period involved in this case.

Mr. Maxwell: They may be withdrawn from the exhibit.

Mr. Avakian: May the record then show I am returning those two checks to counsel for the prosecution?

Mr. Maxwell: Counsel for the prosecution will return them to the witness.

Mr. Avakian: As to the balance of Exhibit 31, the cancelled checks, and Exhibit 32, the ledger sheets, we object to these, your Honor, on the basis of the opening statement of counsel; those checks and ledger sheets have no materiality in this case, because every dollar of payment shown by these

(Testimony of Glenn E. Drew.)

was included in the returns of the taxpayer and these checks could be of no value in this case. They show no unreported income, they could not be used in unreported income under the methods outlined by Mr. Maxwell. If the Court wants to go further into it, I can give further explanation. They are completely immaterial.

Mr. Maxwell: May I say is somewhat difficult to prove unreported income by specific items without first proving what has been reported, in order to eliminate reported items.

Mr. Avakian: My answer is that Mr. Maxwell, in his [39] opening statement, stated the method to get to the income when tax returns were filed was to report the income from certain checks and to add to that what he called the unidentified category. Every one of these checks—Mr. Lohse and I spent considerable time on them—are in the reported category, specific records which were made available to the agents, which they examined. The only possible effect would be to confuse the jury and create some erroneous items to show unreported income.

Mr. Maxwell: I am willing to stipulate these items were reported.

The Court: The objection will be overruled. Exhibits 31 and 32, heretofore marked for identification, will be admitted in evidence.

Q. Now, Mr. Drew, I hand you plaintiff's Exhibit 32 in evidence and I note that there are a number of names in the second column marked

(Testimony of Glenn E. Drew.)

"Item" column. Can you explain what those represent?

A. They represent debtors from whom money was collected.

Q. Those represent names of debtors to Dr. Kelley? A. That is right.

Q. Then your firm was in the business of collecting accounts for the doctor? A. Yes, sir.

Q. And the payments from those patients which you received, are they listed on the ledger sheet there? A. They are. [40]

Q. Are any of the payments from such payments which received by Dr. Kelley on the ledger sheets?

A. They are.

Q. Would you explain how that situation could arise?

A. In some instances accounts had been turned over to us for collection and our efforts were expended in collecting these accounts and in some instances the debtor, instead of paying us or bringing the money into our office, pays the doctor direct.

Q. Then what do you do after payment has been reported to you from his office?

A. We record it and charge the doctor the commission on that item.

Q. So your ledger sheet contains both items for that money collected by the doctor on accounts in your agency, as well as monies paid you?

A. Yes, sir.

Q. There are also entries on that ledger sheet referring to checks and, of course, the checks them-

(Testimony of Glenn E. Drew.)

selves are here in evidence, is that correct?

A. Yes.

Q. Would you explain what monies were paid to the doctor by check?

A. I have these starting with 1949. The first check issued was for February 28th, No. 1582, amount of \$29.50; another check [41] was issued March 31st, No. 1072, amount \$12.00, and so on through these check numbers and date of issuance.

Q. Do you include in those checks the amounts collected at the doctor's office?

A. The bookkeeping entailed the fact that when payments were made direct to the doctor, commission would be charged against the account on this check—I might cite one specific example, where a check was issued to the doctor, it would have been more had monies not been paid to him.

Q. And you reduce the monies due to him by credit for your commission on payments that were made directly to the doctor, is that correct?

A. Yes.

Mr. Maxwell: I have no further questions.

Cross Examination

Q. (By Mr. Avakian): Mr. Drew, I believe you stated that the reason you did not have the checks for the early part of 1949 was the former owner of this business had not been able to locate them?

A. That is right.

Q. I take it, then, that you came into this business sometime during the year 1949?

(Testimony of Glenn E. Drew.)

A. Not I personally. I was his employee since 1946.

Q. You had been an employee all this time?

A. Yes, the former owner of the business died and his brother and another man took over in August of 1949. [41-A]

Q. I was wondering if you had any idea where the checks for the early part of the year might be?

A. Well, Mrs. Holms, who was the widow of the former owner, took charge of a number of those former records, checks stubs and things like that, and some of them were stored at her home, some of them were destroyed. I have not been able to find them.

Q. I take it then that you have made a search for them? A. Yes, sir.

Q. Mr. Drew, in reference to Exhibit 32, the ledger sheets, would you tell us the number of checks shown on the ledger sheets that you were unable to find and produce in court here? I believe there were five. Would you verify that for me?

A. That is right.

Q. Then you produced 19 checks near the end of 1952, so that means during 1946 to 1949 to 1952 your agency issued a total of 24 checks, is that right? A. I haven't found the other checks.

Q. And generally your checks were issued on the last day of the month but not necessarily in every month? A. Right.

Q. And reference to the checks in the ledger, Exhibit 32, is shown there in red? A. Yes.

(Testimony of Glenn E. Drew.)

Q. And the other items are in black? [42]

A. Yes.

Q. So you can identify them also in addition to the reference to the check number? A. Yes, sir.

Q. Do you know whether, during the first part of 1949, when these five missing checks were issued, the bank account of your agency was in the same bank in which the account was carried after that period?

A. Yes, it was in the same bank and there were no difficulties in reconciliation.

Mr. Avakian: That is all.

Mr. Maxwell: I have no further questions.

(Witness excused.)

DON MELVIN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name? A. Don Melvin.

Q. Where do you reside? A. Reno.

Q. Have you been previously sworn?

A. Yes, yesterday.

Q. What is your occupation, sir?

A. Vice-president and manager of the Business and Professional Collection Service in Reno. [43]

Q. Did you have any transactions with Dr. Wayne P. Kelley during 1949 to 1952?

(Testimony of Don Melvin.)

A. Beginning in 1950, to and including 1952, yes.

Q. You have been asked to bring today your records of those transactions, including cancelled checks, amounts paid to you, and your ledger sheets. You have those records with you? A. Yes, sir.

Q. May I have your cancelled checks and ledger sheets? I note that the checks have paper tapes, transparencies, to them. I wonder if you could explain that?

A. The tape is a recap of our collections paid to our office, gross collections; also cover collections paid direct to the doctor, and then our fee is deducted and the balance is mailed to the doctor. Those onion skins are exact duplicates of the receipt that was issued to the paying patient at that time and the check records and the amount of money that we owe the doctor at the end of that particular month's business.

Q. Is that also reflected on these ledger sheets?

A. Yes, every receipt is numbered and the amount of each check is on the ledger and the amount of each commission and the amount payable to the doctor is on the ledger sheet.

Q. Now I notice you have some of the checks attached to the ledger sheet? A. Yes, sir.

Q. Can you detach those? [44]

A. The reason they are attached to this particular ledger sheet is that our accounting system was changed after 1951. We were not using triplicate receipts in 1951, so instead of onion skin, we have

(Testimony of Don Melvin.)

the name of the patient on the ledger sheet. After we started using onion skins, we did not put the name of the patient on the ledger sheet, merely put the receipt number here. That is why we have onion skins, because the names are all right on it. If you wish to take those off, you certainly can.

Q. Now would you hand me the checks and ledger sheets for the periods 1950 to 1952?

A. '50 to '52?

Q. Yes, sir.

A. Well, I would like to explain this 1950 ledger sheet. During the months April to October, 1950, it so happened that we did not write any checks to the doctor because more patients had paid him direct than had paid us. In other words, he owed us money on this particular ledger sheet. Therefore, there are no checks attached to this because any checks that would have been written by the doctor would have been his money. In 1951, the old bookkeeping system, these are cancelled checks. They correspond with this particular ledger sheet.

Q. And this ledger sheet only goes through 1951?

A. Starts in January of 1951 and continues to 1952.

Q. Does it also contain for 1953? [45]

A. Yes, the cancelled checks, the onion skins, did not go into 1953. They were discontinued.

Mr. Maxwell: I will offer these checks, onion skins and ledger sheets as one exhibit. They also have these recaps on. I will offer those, too. The

(Testimony of Don Melvin.)

ledger sheet has entries on for 1953. They are not offered at this time.

Mr. Avakian: I understand from Mr. Maxwell he is willing to stipulate that all payments represented by these checks likewise are included in the reported income and apparently his purpose in offering them is for the same explanation he made in connection with Exhibits 31 and 32, and if that is the case, I would have no objection to the receipt of these exhibits.

Mr. Maxwell: Yes, that is correct. The exhibit is merely offered to facilitate the identification of specific fees and offered to show reported income.

The Court: Very well, the offer is received, subject to the stipulation, as government's Exhibit 33.

Q. Now, Mr. Melvin, your company then is in the business of collecting delinquent accounts?

A. That is correct.

Q. And they collected delinquent accounts for Dr. Kelley, is that correct? A. That is true.

Q. Do you know how the delinquent accounts were collected? [46]

Mr. Lohse: We object to that on the ground it is not within the scope—

The Court: Objection overruled.

A. Frankly, without having the original card, I would have no idea at this time how old any of these particular accounts were before they were assigned.

Q. Now you received amounts from various patients? A. Yes.

(Testimony of Don Melvin.)

Q. And you have a record then, Exhibit 33, is that a record of the patient's name from *whose* those amounts were received? A. Oh, yes.

Q. And the amounts paid by the patients to you are shown on those records? A. Yes, sir.

Q. Are the names and amounts paid by the patient to Dr. Kelley shown on those records?

A. Yes.

Q. That would be any amounts on accounts turned over to you? A. Yes.

Q. Now how did you issue the checks to Dr. Kelley? In other words, what amounts were paid to Dr. Kelley? A. Do you want the amounts?

Q. No, I want to know the general nature of the amounts.

A. Our collection fees are based upon the size of the account. In other words, for an account of to and including \$50, our commission [47] is 50 per cent of the monies collected. Any account over \$50, the commission rate is $33\frac{1}{3}$ per cent.

Q. Would you turn over to Dr. Kelley his percentage of all the amounts collected by you?

A. Well, maybe I had better start it this way. If we collected, say \$100 for the doctor on several different debtors, the gross collection that we made for the doctor was \$100, and all of these particular accounts were less than \$50, our commission would be 50 per cent.

Q. Let us assume that situation of it.

A. If we collected \$100 for the doctor, we would send the doctor in a check for his share, which

(Testimony of Don Melvin.)

would be \$50. However, had a patient come to the doctor and paid him an account of \$50, the doctor would in turn owe us \$25 on that particular collection he made.

Q. Because he turned it over to you?

A. So that at the end of the month we would balance it out; say he owed us \$25, we owed him \$50, we would send him a check for the difference, which in this case would be \$25.

Q. How would you find out when the patient paid the doctor?

A. The doctor or his girl would call and report to us that so and so made such a payment, and we would run it through our books as a direct payment.

Mr. Maxwell: I have no further questions.

Mr. Lohse: The defendant has no questions, your Honor.

(Witness excused.) [48]

GEORGE RATHMANN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please, sir? A. George Rathmann.

Q. Were you sworn yesterday, sir?

A. Yes, sir.

Q. Where do you reside, Mr. Rathmann?

A. 2203 Plumas Street, Reno.

Q. What is your occupation?

(Testimony of George Rathmann.)

A. Assistant secretary Home Furniture Company in Reno.

Q. Mr. Rathmann, your company has been ordered to bring records of the sale of furnishings to Dr. Wayne P. Kelley, together with records showing method of payment thereof for the period 1949 to 1952. Have you brought those records with you, sir? A. Yes, sir.

Q. May I have them. Do you have anything else beside this ledger sheet?

A. Both sheets, sir.

Q. May I have these? Now, you have handed me two pieces of ledger sheet paper. Can you state what this is?

A. Yes, it is a record of purchases and payments.

Q. Made by whom?

A. By Dr. Wayne P. Kelley. [49]

Q. And for what period, sir?

A. Started in 1946 and up to August, 1948.

Q. Does that contain a record of items of furniture purchased during that period of time?

A. Yes, sir.

Q. Now you have handed me a yellow sheet of paper. What is that?

A. That is a record of charges and credits of Dr. W. P. Kelley.

Q. With your firm? A. Yes, sir.

Q. And for purchases of what items?

A. Well, for various items.

Q. And for what period is that?

(Testimony of George Rathmann.)

A. Starts at 1951 and through January, 1952.

Mr. Maxwell: I will offer these ledger sheets as government's exhibit next in order.

Mr. Lohse: We have no objection to the admission of the ledger sheets.

The Court: The offer will be received in evidence as government's Exhibit 34.

Q. Mr. Rathmann, I see on these first pages here of the ledger sheet that there are three columns, one says Dr., Cr., and Bal. at the top. Would you explain what these entries are, generally?

A. The first column, Dr, is abbreviation for debtor and that means charge to the account. [50]

Q. What do you mean?

A. Something that had been purchased.

Q. And not yet paid for? A. Yes.

Q. And the second column?

A. The second column, Cr, stands for credit, which is payment.

Q. In other words, that is a record of payments?

A. Yes, or a return.

Q. What do you mean by a return?

A. Well, for instance, there was purchase made of several items and one was returned. Put it down for credit.

Q. Can you tell the difference between that and a cash payment?

A. Yes, because it is listed in the information column by the word "credit."

Q. Now, does that same thing hold true with

(Testimony of George Rathmann.)

respect to this yellow sheet, which is the last page of the exhibit?

A. No. On the last sheet of the yellow page this just has the word "charge" and "credit" and the balance.

Mr. Maxwell: No further questions.

Mr. Lohse: The defense has no questions, your Honor.

(Witness excused.)

WILLIAM T. NORRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): Will you state your full name, please? [51] A. William T. Norris.

Q. You were previously sworn here under the name of Tim Norris, is that correct? A. Yes.

Q. Where do you reside, sir?

A. Reno, Nevada.

Q. How long have you resided in Nevada.

A. Ten years.

Q. Where are you employed?

A. Scott Motor Company.

Q. You have been an employee there how long?

A. A year.

Q. You were requested to bring certain records with you by subpoena ducas tecum. Have you brought those records? A. Yes.

Q. I wonder if I may see them. Mr. Norris, you

(Testimony of William T. Norris.)

have handed me a card here dated December 26, 1950, for one new——

Mr. Avakian: Just a moment, please, we haven't seen the statement yet, nor is it in evidence.

Mr. Brown: Simply for identification.

Mr. Avakian: It is in your hand. You know and he knows what it is.

Mr. Brown: I would mark it for identification, document dated December 26, 1950, purporting to be an order——

Mr. Avakian: I think that identifies it without reading [52] the contents.

The Court: The offer will be marked for identification government's Exhibit 35.

Mr. Avakian: Your Honor, we are willing to stipulate to these documents, including the yellow card and invoice.

Mr. Brown: We would like to have the car order, dated December 26, 1950, signed by Wayne P. Kelley, M.D., marked for identification, in evidence.

The Court: Exhibit 35 for identification will be received in evidence on the part of the government by the same number.

Mr. Brown: We offer the invoice of Scott Motors Company, dated 2-27-51, for special automobile, as plaintiff's exhibit next in order.

Mr. Lohse: Oh, there is no objection.

The Court: The offer will be received in evidence as government's Exhibit 36.

Mr. Brown: It should be noted there, in connec-

(Testimony of William T. Norris.)

tion with Exhibit 35, that there is attached thereto receipt No. 13183, 13605.

Q. Now, Mr. Norris, would you tell the Court and the jury what is the purpose of the card here and record as kept by Scott Motors Company?

A. Agreement between purchaser and Scott Motors Company, the purchase order for 1951 Cadillac. [53]

Q. It is signed by the purchaser, is that correct?

A. Signed by the purchaser.

Q. What is the purchase price of the automobile reflected by the car order? A. \$3704.

Q. Does the car order reflect a cash down payment? A. No, it shows the deposit.

Q. A deposit? A. A deposit on it.

Q. That is reflected, is it not, by one of the receipts? A. Yes.

Q. Attached to the order? A. Yes.

Q. In amount of how much?

A. Two hundred fifty dollars.

Q. What is the second receipt that is attached to the order? Would you describe that for us?

A. It is made out to Wayne P. Kelley in amount of \$3,454.

Q. Does that represent the final payment on the automobile? A. Final payment, balance.

Q. Now, with reference to the car invoice, would you explain what is the purpose of the invoice?

A. The purpose of the invoice is to show the final transaction at the time of the delivery of the car.

(Testimony of William T. Norris.)

Q. Does the invoice reflect the total purchase price of the [54] automobile, as it is reflected on the car order? A. Yes.

Q. And what is that figure? A. \$3704.

Q. Briefly, how is that \$3704 broken down, if you can tell by the invoice?

A. Base price was \$3413.55 and the optional equipment totalled \$290.45.

Q. What is the optional equipment, if you can tell?

A. White wall tires, radio, heater and accessories No. B, whatever that is.

Q. You have delivered to me certain photostat copies of the exhibits, have you not? A. Yes.

Mr. Brown: For withdrawal of the exhibits which have been offered in evidence and substitute photostatic copies. You may inquire.

Mr. Avakian: No questions.

(Witness excused.)

Mr. Avakian: Your Honor, we likewise have no objection to withdrawal of the original and substitution of the photostats as the prosecution desires.

JOE HINOTE

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [55]

Direct Examination

Q. (By Mr. Brown): You have been previously sworn, in this matter, have you not?

A. Yes, sir.

(Testimony of Joe Hinote.)

Q. And your name is Joe Hinote? A. Yes.

Q. Where do you reside?

A. 1461 Wright Street, Reno.

Q. You have resided in Nevada how long?

A. Twelve years.

Q. What is your occupation or profession?

A. Automobile business.

Q. And you have been in that business how long?

A. From the time I have been in Nevada and many years prior to that.

Q. What is your present business?

A. Automobile.

Q. Now you were subpoenaed to appear here today, were you not? A. Yes, sir.

Q. And there were certain documents listed upon your subpoena that you were requested to bring with you, is that correct? A. Yes.

Q. Could you briefly describe them?

A. I have the original order and the repair order and copies of memorandums in connection with an automobile purchased from the McCaughey Motors November 27, 1948. [56]

Q. How do you happen to be in possession of those records, sir?

A. I purchased the business of McCaughey Motors and took over the assets of the McCaughey Motors.

Q. These records were a part of the business records that were transferred to you, is that correct? A. Yes, sir.

(Testimony of Joe Hinote.)

Q. You didn't actually make these entries and they were not actually made under your supervision? A. They were not.

Q. You have them simply because of the fact that you were a successor? A. Yes.

Q. Would you hand me the invoice please?

A. Yes.

Mr. Avakian: May we examine the witness on voir dire, with respect to the foundation, particularly in regard to the statement he acquired these records by purchase of the business. I would like to have the invoice marked for identification.

The Court: The offer will be marked for identification as government's Exhibit 37. You may inquire on voir dire.

Q. (By Mr. Avakian): Mr. Hinote, when did you purchase this business?

A. In 1950. [57]

Q. And you personally were not connected with the business prior to that time? A. No, sir.

Q. And you simply acquired this along with other records you received, is that right?

A. Yes, sir.

Q. Do you have any personal knowledge as to the bookkeeping or accounting procedures which were followed in November, 1948, in that business?

A. Yes.

Q. You were there——

A. I wasn't there but I took over the records and we audited.

Q. Perhaps I didn't make my question clear. Do

(Testimony of Joe Hinote.)

you have any personal knowledge, based upon your own personal observations, as to the manner in which the bookkeeping entries were being made by the employees in November of 1948?

A. Not personally, other than the records indicate.

Q. With respect to the manner of payment of the sums shown on this invoice, do you have any knowledge other than what is on the document itself?

A. Well, what is shown in the sales journal.

Q. Do you have that with you?

A. I do not.

Q. I take it you have no personal knowledge?

A. No, sir. [58]

Mr. Avakian: Your Honor, we do not desire to base any objection on lack of foundation. We are more concerned about the matter of whether the matter of payments will be cleared up and I would like, through the Court, to address a question to counsel, whether they intend to follow up on this.

The Court: Very well.

Mr. Maxwell: Well, may it please the Court, first of all this is an asset in the net worth computation. This is an asset of the defendant, purchased during one of the years. Now the matter of purchase I think Mr. Avakian is interested in is whether it was cash or check, is that correct?

Mr. Avakian: The thing I am concerned with is it was transaction in 1948 prior to the years involved in this case and this document, on its face,

(Testimony of Joe Hinote.)

shows a certain amount of unpaid balance, which, without further explanation, would show a liability, which would work to decrease net worth and unless that matter is clarified, it would work to some disadvantage.

The Court: You have offered this in evidence?

Mr. Maxwell: Yes.

The Court: The offer in evidence will be received and the offer will be designated government's Exhibit 37. Now I am just a little confused, so I suggest you proceed and make objection at the proper time.

(Jury admonished and recess taken at 11:00 o'clock.) [59]

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

Mr. HINOTE

resumed the witness stand on further

Direct Examination

Q. (By Mr. Brown): Now referring to the car order, Mr. Hinote, can you, from examining that instrument, tell the jury and the Court what was purchased by Dr. Kelley?

A. This was a Mercury car, Model 72, which was a six-passenger coupe, for the sum of \$2832.

Q. Two thousand eight hundred thirty-two?

A. Yes.

Q. On what date?

A. That was on November 27, 1948.

(Testimony of Joe Hinote.)

Q. Now I note, from examining that instrument, that there is indicated in the right-hand column at the bottom, a balance due of \$1800?

A. Yes, sir.

Q. Does that figure reflect an unpaid balance at that time?

A. That reflects an unpaid balance at the time the order was written.

Q. And this is more than just a purchase order?

A. Yes, sir.

Q. And then there was no unpaid balance that date—can you indicate what the word is there? [60]

A. The word is November 29, 1948.

Q. You have handed me a bill of sale, which we would have marked for identification plaintiff's exhibit next in order, 37(a), your Honor. Now was that bill of sale taken from the same records?

A. Yes sir.

Q. Would you describe the bill of sale to the jury and Court please?

A. Bill of sale is dated November 29, 1948, conveying clear title to Wayne P. Kelley, M. D., for the purchase of this 1949 Mercury.

Q. That is a duplicate copy?

A. That is a duplicate copy from our files when the car was delivered and paid for in full.

Q. Would it be the custom of an automobile business to issue such a bill of sale if there was an unpaid amount due on the automobile?

A. No sir.

Q. Can you determine, from examining your

(Testimony of Joe Hinote.)

records, whether the amounts paid by Dr. Kelley were paid by cash or by check?

A. That I can not do.

Mr. Brown: We offer the bill of sale in evidence as plaintiff's No. 37(a). You may inquire, gentlemen.

The Court: We have been following the practice of using letters for identification. [61]

Mr. Maxwell: Why not include it on our 37?

The Court: Then the offer is received in evidence as a part of Exhibit 37.

Cross Examination

Q. (By Mr. Avakian): Mr. Hinote, from the two documents which you have identified and which are in evidence now as Exhibit 37, are you satisfied in your own mind, from your knowledge of these records, that the full purchase price for this Mercury was actually paid in November of 1948?

A. Yes sir.

Q. And there was no balance due then thereafter?

A. No sir.

Mr. Avakian: Thank you, that is all.

(Witness excused.)

RUSSELL H. WILSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please for the record?

(Testimony of Russell H. Wilson.)

A. Russell H. Wilson.

Q. Where do you reside, Mr. Wilson?

A. My home is in Piedmont, California.

Q. What is your occupation?

A. I am a stock broker.

Q. For what firm? [62]

A. The firm of Wilson, Johnson & Higgins.

Q. Are you a partner of that firm?

A. I am a partner.

Q. You have been asked to bring today certain records of the account of your company with Wayne P. Kelley and others. Do you have those records with you? A. I do.

Q. Will you kindly tell me what records you have?

A. I have here the ledger sheets which shows Dr. Kelley's transactions with my firm; I have cash deposit tags.

Q. May I have the ledger sheets. Are these the ledger sheets and deposit slips attached to them, is that correct? A. Correct.

Q. And the ledger sheets also have note on them that you were unable to locate certain deposit slips?

A. Yes.

Q. Now did you make a search for those deposit slips? A. Yes.

Q. And you were unable to find them?

A. Yes sir.

Q. Now you have handed me the documents in two distinct classifications. What is this first classi-

(Testimony of Russell H. Wilson.)

fication document? Can you tell me what the account is?

A. Dr. Kelley had two accounts with us.

Q. And this first account is in what name? [63]

A. Dr. Wayne P. Kelley, Mrs. Lois Kelley, James Leighton, Phyllis K. Kelley.

Mr. Maxwell: We will offer this group of ledger sheets and deposit slips pertaining to that account as plaintiff's exhibit next in order.

Mr. Avakian: May we have a moment to examine them?

The Court: Yes, counsel may examine them.

Mr. Avakian: Your Honor, we have no objection with respect to the authenticity as to these documents. We do wish to raise an objection, at least tentatively, to the materiality. I would like to make argument on that objection. I do not know whether the Court would like to hear it in the presence of the jury or the absence?

Mr. Maxwell: It is obviously not worth, was during the years involved, and I do not think there is any question about that.

Mr. Avakian: We would like to make argument on it.

The Court: Very well.

Mr. Avakian: The objection which I wish to make—and as I say, I am making this tentatively—is that I do not believe the proper foundation has been laid at this time as to the presentation in a not worth type of case, because there has been no evidence as yet with respect to the starting point,

(Testimony of Russell H. Wilson.)

which the Supreme Court has said is essential on a net worth case. I believe, in view of the fact that there is no objection raised [64] as to the authenticity of the document, that it would be proper to mark these for identification and to offer them later on, in the event the starting point evidence is presented, but my concern is that if the foundational requirements for the starting point net worth are not met, the introduction of this evidence in the meantime would tend to have some sort of prejudicial effect and my motion to strike might not be sufficient to raise that prejudice, so I would object to the receipt of this evidence at this time, on the ground that the prosecution has not, as yet at least, offered evidence which would tend to establish a starting point, and having failed to do that, the evidence relating to acquisition or sale of assets during the period covered by the case should not be received.

The Court: Objection overruled, with the right on the part of counsel to raise that objection later and at that time the Court will consider a motion to strike. That will be government's Exhibit 38 in evidence.

Q. Now this second group of documents that you have handed me consists of a separate account, does it, from the first group? A. That is right.

Q. In what name is that account?

A. In the name of Dr. Wayne P. Kelley, Mrs. Lois K. Kelley.

Q. And that contains one deposit slip and two

(Testimony of Russell H. Wilson.)

letters, together with an explanatory note in nature of deposit slip and one deposit? [65]

A. That is right.

Mr. Maxwell: I will offer this group as government's exhibit next in order.

Mr. Avakian: Your Honor, may we make the same objection to this on the same basis as to Exhibit 38.

The Court: Very well. It will be the order of the Court that the offer will be received in evidence as government's Exhibit 39, under the same conditions as Exhibit 38, that the defendant may move to strike.

Q. Handing you Exhibit 38, and making particular reference to the yellow ledger sheets, can you explain to me the meaning of the column on that ledger sheet and the entries thereon, generally?

A. Well, starting at the left-hand side of the sheet, first column top——

Mr. Maxwell: May the record show I show plaintiff's Exhibit 39 to the jury at the same time.

The Court: You are exhibiting No. 39 to the jury merely to show it is the same form that the witness is testifying to.

Mr. Maxwell: While the witness explains.

A. Column left at the top, it shows at the top old balance of the account. Going across the page it will show purchases, our receipt for securities. The next column will show what has been [66] sold or delivered and name of the security. Next column will show the price.

(Testimony of Russell H. Wilson.)

Q. Unit price per share?

A. Unit price per share. The next column shows the total amount paid for the security.

Q. That shows total amount paid by you?

A. That is total amount client owes us, or it will also show total amount the debit to the client's account, the amount of money is owed us. Next column is payment to us, and final column is the new balance.

Q. And that balance is the amount the doctor owes you?

A. At varying times that last column will show how much the client owes the firm or the firm owes the client.

Q. But the credit column shows payments, next to the last column?

A. That is right, payments to the firm.

Q. By the client? A. By the client.

Q. In this case Dr. Kelley?

A. Dr. Kelley.

Q. Now with respect to the payments shown in the credit column, do you have any way of telling whether those payments were by cash or by check?

A. Yes, we do.

Q. And what is that means that you have of telling? [67]

A. We have the deposit tag, the duplicate deposit tag, when we make our deposit at the bank.

Q. These deposit tags you have attached to each of these exhibits consists of your duplicate deposit tag, deposit of the firm in its bank account?

(Testimony of Russell H. Wilson.)

A. Yes.

Q. With what bank did your firm do business?

A. We have an account at the First National Bank of Nevada.

Q. And these deposit tags are deposited by your firm in that account? A. Yes.

Q. Now going down to credits in Exhibit 38, what is the first credit or payment shown on your ledger sheet by Dr. Kelley?

A. Credit of fifty-five thousand dollars.

Q. Now when was that paid?

A. On June 23rd when it was entered in the books. Deposited on June 21st.

Q. On June 21st of what year? A. 1950.

Q. You say it was entered in the books as of June 23rd? A. Yes.

Q. And that is shown on your deposit tag by that date?

A. It is shown deposited on June 21st.

Q. Did you make a separate deposit tag for each payment received from your customers? [68]

A. I can't say positively about that.

Q. Did there appear to have been separate deposit tags made for Dr. Kelley?

A. There are a series of deposit tags for Dr. Kelley's account.

Q. Then your deposit tag of June 21st shows payment of 55 thousand dollars by the doctor and your deposit of that amount in the bank?

A. Yes.

Q. How was that amount paid, by check or cash?

(Testimony of Russell H. Wilson.)

A. That was paid in currency.

Q. Now what is the next credit on the account?

The next credit was \$12,909.45, which was by check.

Q. And do you have a deposit tag for that?

A. Yes, there is a deposit here.

Q. Does it show what bank that was written on?

A. First National Bank. 94-4 one check; 1-32 second check.

Q. What was the date of that, that \$12,909?

A. That was on July 25, 1950.

Q. And what is the date of your deposit tag?

A. July 21, 1950.

Q. In the ordinary course of your business, would you deposit such amounts on the same day they were received?

A. Not necessarily with checks.

Q. With cash would you deposit the same day?

A. With cash the same day. [69]

Q. With checks would there be a delay of any substantial period of time?

A. There could be two or three days' delay, particularly weekends.

Q. Nothing like two or three months?

A. Oh no.

Q. Now what is the third payment shown on your ledger sheet in Exhibit 38?

A. We show a cash payment to us of \$5083.83.

Q. What is the date of your entry?

A. That would be July 31st.

Q. Of what year? A. 1950.

(Testimony of Russell H. Wilson.)

Q. And do you have a deposit tag for that amount? A. Yes, I do.

Q. What does that deposit show?

A. That shows currency of \$1420 and two checks drawn on the bank, one 29-7, the other 94-2.

Q. What are the amounts of those checks?

A. \$3,638.83 and \$25.00.

Q. And what is the date of the deposit tag?

A. July 28th.

Q. And the entry was July 31st, I believe you said? A. Yes.

Q. And that is 1950? [70] A. 1950.

Q. And what is the next payment on your ledger sheet? A. \$4,995.50.

Q. What is the date of that?

A. That was on September 25, 1950.

Q. Do you have deposit tag corresponding to that too? A. Yes, I do.

Q. What is the date of that deposit tag?

A. The deposit tag is September 22nd.

Q. And how does that show the amount was paid?

A. It shows currency of \$4,847 and a check for \$148.50 on bank 94-2.

Q. What is the next payment on your ledger sheet?

A. On October 4, 1950, \$475.30.

Q. Do you have a deposit tag for that payment?

A. Yes, I do.

Q. And does it show how that amount was paid?

A. That was paid by check, 94-2.

(Testimony of Russell H. Wilson.)

Q. And what is the next payment received by you?

A. The next is on October 17, cash \$494.70.

Q. Do you have a deposit tag for that?

A. I do, dated October 16, 1950.

Q. And does it show how that payment was made? A. That was currency.

Q. What is your next payment? [71]

A. Next payment to us is \$2,512.98.

Q. The date? A. On November 2, 1950.

Q. Do you have a deposit tag for that?

A. Yes, there is a deposit tag here.

Q. What is the date of that?

A. October 31st.

Q. Still 1950? A. 1950.

Q. How was that paid?

A. That was \$1900 in currency and check for \$587.98 and check for \$25.00, both on 94-2.

Q. And the next payment, sir?

A. The next payment to us was \$996.32.

Q. And your ledger sheet entry?

A. Is November 8, 1950.

Q. Do you have a deposit slip showing how that was paid? A. Yes, I do.

Q. How was that paid and what is the date of the deposit slip?

A. Deposit slip date is November 6, 1950. It was paid by check, bank 94-2, \$996.32.

Q. And your next payment?

A. Next payment was \$26,486.25.

Q. What is the date of that check?

(Testimony of Russell H. Wilson.)

A. That was November 21, 1950. [72]

Q. Do you have a deposit slip for that payment?

A. Yes, I do.

Q. What is the date of your deposit slip?

A. November 20, 1950.

Q. And does your deposit slip show how that was paid?

A. That was paid by check, bank 94-2.

Q. And your next payment received from Dr. Kelley? A. \$12,909.45.

Q. And what was the date of that?

A. Oh, I beg your pardon, sorry, I have the wrong page. The next was \$3995.

Q. The date?

A. And the date was March 20, 1951.

Q. And do you have a deposit slip for that date?

A. That is one of the deposit tags we couldn't locate.

Q. What was the date of that again, sir?

A. That was March 20, 1951. The ledger states it was paid by check.

Q. The ledger states it was paid by check?

A. Yes, sir.

Q. And what is the next amount, sir?

A. Well, there are a series of amounts here credited to Dr. Kelley's account for the sale of securities, but the next payment into the account, that is the last there was on sales of securities. [73]

Q. In other words, you sold some securities for him and the account was credited with the proceeds? A. That is correct.

(Testimony of Russell H. Wilson.)

Q. Now I will show you Exhibit No. 39 and I will ask you, does that show some transactions between Wilson, Johnson & Higgins and Dr. Wayne P. Kelley? A. Yes, it does.

Q. Does it show payments made by Dr. Kelley to them? A. It shows two payments.

Q. What is the first payment, sir?

A. The first is \$1,975 on April 16, 1951.

Q. And you have a deposit tag for that sir?

A. We did not find that deposit tag. The ledger states it was by check.

Q. The ledger states it was by check?

A. Yes, sir.

Q. And what is the next payment under that Exhibit 39?

A. The next payment was \$10,193.75 on May 17, 1951.

Q. Do you have deposit slip on that payment?

A. Yes, I do.

Q. What is the date of the deposit?

A. Deposit was made, it looks like May 16, 1951.

Q. And does the deposit slip reflect how that amount was paid?

A. In currency \$3,260 and by check \$6,933.75; bank 94-2.

Q. Now, Mr. Wilson, I wonder if you would tell us what your [74] firm is, in general?

A. We are stock brokers, members of the San Francisco Stock Exchange. We are dealers in securities and underwriters.

(Testimony of Russell H. Wilson.)

Q. And your transactions with Dr. Kelley were primarily what?

A. They were primarily dealing with the doctor on over-the-counter issues. At that time we were not a member of the Stock Exchange. Our transactions with the doctor were over-the-counter basis.

Q. You bought for the doctor for his account?

A. We sold stocks for the doctor for his account.

Q. Did you hold those stocks for the doctor after the sale?

A. From time to time we would hold securities for safe-keeping for Dr. Kelley.

Q. At other times would you deliver stocks which you purchased to him? A. Yes.

Q. Would your ledger sheets also reflect receipt of dividends?

A. It would reflect the receipt of dividends on issues which were in the transfer when we claimed dividend for him, or where stock was left in the street name.

Q. You might explain street name.

A. That is where a person does not desire to have certificate transferred to their own name; it is endorsed by the former owner and signature guaranteed at the bank or broker and certificate is delivered on that basis. [75]

Q. I will show you Exhibit 26 for identification and ask you if you can tell me what that exhibit is?

A. The original of these deposit tags.

Q. In other words, those are the original of deposit tags enumerated in Exhibits Nos. 38 and

(Testimony of Russell H. Wilson.)

39? A. Yes; these are duplicates.

Q. And the ones in 38 and 39 are duplicates?

A. Yes.

Q. I wonder if you can find the two missing deposit slips in the original slips, one dated March 20, 1951?

A. No, sir, I don't find it here.

Q. Would you refer to your ledger sheet on March 20, 1951 payment and that is in amount of what? A. \$3995.

Q. And does your ledger *sheet what* was received on that date, check or cash?

A. It shows check received.

Q. Now I think the deposit slips generally run one day previous to the payments, do they?

A. The entry in the ledger wouldn't be made until the deposit duplicate reached our San Francisco office.

Q. Here is deposit slip dated March 19, 1951 for \$3450. Would that be part of that deposit?

Mr. Avakian: The amount, if I recall, is different.

Mr. Maxwell: That is correct. [76]

Mr. Avakian: I object to counsel asking leading questions of a speculative nature. It is a different date and different amount than the ledger sheet shows. The ledger sheet shows a payment by one check. I don't see where a deposit tag in a lesser amount could be representing deposit of a single check in a larger amount.

(Testimony of Russell H. Wilson.)

Mr. Maxwell: If it doesn't, I am sure the witness will tell us.

Q. Now we are also on Exhibit 39 missing a deposit tag for what date, sir, and in what amount?

A. The date was April 16, 1951 and the amount was \$1975.

Q. And there is no deposit tag in here for that amount, is there?

Mr. Avakian: What does counsel mean by "in here"?

Mr. Maxwell: Exhibit 26 for identification.

A. There is no tag.

(Jury admonished and noon recess taken at 12:00 o'clock.)

Afternoon Session, March 27, 1956. 1:30 P.M.

Defendant present with counsel. Presence of the jury stipulated.

MR. WILSON

resumes the witness stand.

Mr. Maxwell: You may examine.

Cross Examination

Q. (By Mr. Avakian): Mr. Wilson, I will give you Exhibits 38 and 39, so that you [77] may refer to them if necessary. Now you testified, Mr. Wilson, that Dr. Kelley had two accounts with your firm. One of these was in the name of Dr. Kelley and his wife, is that right?

A. Dr. Kelley and Mrs. Lois K. Kelley.

Q. And the other account was in the names of Dr. Kelley and his wife and their two children?

(Testimony of Russell H. Wilson.)

A. Yes.

Q. That is the only difference between the two?

A. As far as I know of.

Q. These accounts were handled in your San Francisco office or your Reno office?

A. In the office here.

Q. In Reno? A. Yes.

Q. And you are in the San Francisco office, is that right? A. That's right.

Q. And I assume your permanent records are kept there, rather than in Reno?

A. That's right. The bookkeeping is done in San Francisco.

Q. What type of records does Wilson, Johnson & Higgins keep with respect to its customers' accounts?

A. When transactions are executed we send out confirmation, state number of the stock, number of shares, number of securities and extension, that is, the total purchase price.

Q. Is that confirmation mailed from your main office in [78] San Francisco or from your branch office where the business is transacted?

A. It is mailed from San Francisco and there are many duplicate copies of that confirmation; one to the bookkeeping department for the bookkeeper's information. The bookkeeping machine makes the entries. At the end of the month we send every client a copy of the statement for his disposition, as of the end of the month. Our books are audited annually by Ernest & Ernest.

(Testimony of Russell H. Wilson.)

Q. Would you state, for the information of the Court and jury, what Ernest & Ernest is?

A. Certified public accountants.

Q. That is a world-wide accounting firm?

A. Yes.

Q. Do you give any further information?

A. I think that is all.

Q. I notice that you testified that Dr. Kelley had made ten payments to your firm in connection with one of these accounts which is reflected by Exhibit 38 and two payments reflected in the other account, Exhibit 39, a total of 12 payments. Now you stated that you were unable to locate the bank deposit tags on a couple of these transactions. Was a search made in your office for those tags?

A. Oh yes there was.

Q. A total of three out of twelve missing and the search [79] failed to turn them up, is that right?

A. Yes sir.

Q. So apparently those were mislaid or lost or something of that kind?

A. Yes.

Q. You refer to the fact that some of the stock purchased by Dr. Kelley was held in a street name, I think is the term you used. Would you explain again the meaning of that term?

A. Stocks that do not pay dividends frequently are left in what we call street names; that is, the name of the last owner of the stock, the one that issues the stock, and it is endorsed by that owner and the endorsement is guaranteed by the bank or member of the Stock Exchange.

(Testimony of Russell H. Wilson.)

Q. What commonly is the reason for leaving it in that form of ownership, rather than issuing in the owner?

A. To avoid cost of transfer. There might be some very heavy transfer tax involved.

Q. That is, it was a fairly common practice in the brokerage business?

A. It is in some active accounts.

Q. And actually it represents a more convenient and less cumbersome method of purchasing and selling and transferring securities, is that right?

A. That's right.

Q. It is a considerable convenience to you in the brokerage business? [80]

A. It cuts down our bookkeeping, is just as satisfactory. It also permits the client, when he had decided to sell next week, the stock might be back in some transfer office.

Q. So if you receive the order to sell and desire to sell promptly, you can sell more rapidly if the stock is held in a street name than if it were registered in the name of the owner?

A. If you have it registered in the owner, the certificate is on hand. The stock in a street name doesn't require that.

Q. And that frequently means it can be sold more rapidly, isn't that right?

A. There is not much difference if stock is on hand.

Q. Suppose I am one of your hypothetical clients——

(Testimony of Russell H. Wilson.)

Mr. Maxwell: I object to making him an expert witness on this particular phase and asking for his conclusion. He is here to testify to the records we have.

The Court: We started out to get explanation of street name and I think we have it.

Mr. Avakian: I just want to make it clear. The direct examination introduced this idea of not registering this stock in Mr. Kelley's name. I would like to make clear to the jury the convenience involved in using a street name, and it is for that purpose and I would like to complete with one or two questions.

The Court: The Court understands. Let us have the question. [81]

Q. Mr. Wilson, if a client says to sell some securities he owns and in his own name and his possession, they may be in a safe deposit box at the bank, and before you can sell those, he would have to leave his activities or business and go to the safety deposit box to get them personally, whereas, if they were held in a street name, they could be sold immediately, is that right?

Mr. Maxwell: That calls for opinion. No foundation. Assumes facts not in evidence by any stretch of the imagination in this case.

The Court: Objection sustained.

Mr. Avakian: I think that is all.

Redirect Examination

Q. (By Mr. Maxwell): Your clients do not in-

(Testimony of Russell H. Wilson.)

icate to you their purpose for having stocks registered in street names, do they, ordinarily?

A. No.

Mr. Maxwell: That's all.

(Witness excused.)

HOWARD A. BENNETT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, please? A. Howard A. Bennett.

Q. Where do you reside, Mr. Bennett? [82]

A. I live in Oakland, California.

Q. What is your occupation, sir?

A. I am secretary to Mr. Van Strum of Van Strum & Towne Investment, Inc.

Q. Do you have anything to do with Technical Fund?

A. Van Strum & Towne Investment Inc. manages Van Strum & Towne Fund Inc., which is, I will not say successor, but a new designation for Technical Fund.

Q. And the Technical Fund is incorporated and is a corporation?

A. It is a mutual investment fund, or was the Van Strum & Towne Fund, just the same.

Q. Then can you explain a little bit what a mutual investment company is?

A. Well, it is a corporation, whose business is

(Testimony of Howard A. Bennett.)

the holding of securities of various corporations in America.

Q. And does the corporation itself issue shares and sell stock? A. Yes, it does.

Q. Now you were asked to bring today records pertaining to the ownership of shares in Technical Fund, Inc., by Dr. Wayne P. Kelley. Did you bring those records?

A. I have such records as requested.

Q. Did you also bring checks in payment of dividends? A. I brought checks.

Q. Then I wonder if you would give me the checks for dividends on the account. Now you have handed me two different groups of [83] checks, both of them having Technical Fund Inc. at the top. Can you tell me the difference between the two?

A. Yes, one here in Mrs. Kelley's name——

Q. And this first group of checks which you have handed me, in what name do they appear?

A. Mrs. Lois K. Kelley, Wayne T. Kelley, James Leighton Kelley, as joint tenants.

Q. And these represent dividends paid to Dr. Kelley, or to the persons named as payees on the check? A. That is right.

Q. For the period 12-30-1951 to 12-30-1952?

A. Yes sir, they do.

Mr. Maxwell: I ask that these be marked government's next in order and offer them in evidence.

The Court: Do you offer both groups of checks together?

(Testimony of Howard A. Bennett.)

Mr. Maxwell: No, your Honor, I am going to offer the other group separate.

Mr. Avakian: We have no objection, your Honor.

The Court: The offer will be received and marked Exhibit 40 on the part of the government.

Q. Now the second group of checks which you have handed me, are they all in the name of Wayne P. Kelley?

A. And Mrs. Kelley. Some of them have the children on and one has Mrs. Phyllis Kelley on it.

Q. Phyllis I. Kelley? A. Phyllis I. Kelley.

Q. Are they payable to different persons?

A. No. According to the records, I was able to determine the way which this dividend came in. There was a confusion the way the dividend came in on the shares on which the dividend was determined and in the case of the Phyllis check for \$10, we deposited the check to Phyllis and Wayne Kelley, et al. That is out of the dividend of Wayne P. Kelley.

Mr. Maxwell: I offer this group of checks as government's next in order.

Mr. Avakian: Your Honor, with the exception of the check to Mrs. Phyllis I. Kelley, we have objection to her. As to that, we object on the ground no proper foundation laid to admit that check in this case.

The Court: The dividend check?

Mr. Avakian: Yes. We are not concerned about the ten dollars but possible implication that might be drawn from it and until proper foundation is

(Testimony of Howard A. Bennett.)

laid we would object to that; otherwise, we have no objection to the rest.

Mr. Maxwell: I think the witness testified in the name of Phyllis I. Kelley in error.

A. I have a subsequent check, \$852.50, which covers the \$10 plus \$843.60.

Mr. Avakian: Where is that check? [85]

A. It is a copy of our dividend accountings. We are getting into another subject.

Mr. Avakian: I think that makes it all the more clear this check is immaterial, should not be admitted in this group.

The Court: Well, it is difficult. Objection overruled.

Mr. Maxwell: May I point out the \$843.60 is right on top of the checks.

Mr. Avakian: I understood he had a different check.

A. I have a large group. I do have subsequent check.

Mr. Avakian: It appears the \$10 is included in the \$843.60 and would be erroneous duplication.

The Court: That is my understanding, counsel; the record is clear on it.

Mr. Avakian: Thank you.

The Court: The offer will be received in evidence as government's Exhibit 41.

Q. Did you bring some other checks?

A. Yes, I have checks on what is called Technical Fund Distributors.

Q. What are those checks?

(Testimony of Howard A. Bennett.)

A. Now we get into the subject of reinvestment on this. Dr. and Mrs. Kelley's reinvestment of their dividends and disbursed into additional shares as dividends became available and when [86] the dividends were accumulated at the end of the quarterly period, they were issued additional shares and there was always a certain amount which would be less than a share and a check was issued for that.

Q. What was left over from investment of dividends? A. That is correct.

Q. First, sir, give us the authorization of Dr. Kelley and Lois Kelley to make the reinvestment of the dividends. Do you have those with you?

A. I have some photostatic copies of records in the bank.

Q. These are in the Crocker National Bank?

A. That is correct.

Q. Did the Crocker Bank make the photostat?

A. They did.

Q. They handed to you these photostats?

A. That is correct.

Mr. Avakian: We have no objection as to the authenticity, your Honor.

Mr. Maxwell: I will offer these as government's Exhibit next in order.

The Court: What do you mean by "these"?

Mr. Maxwell: They are dividend reinvestment orders issued to the Technical Fund and Technical Fund Distributors and signed by the owners of the shares, Wayne P. Kelley, Mrs. Lois K. Kelley, etc.

(Testimony of Howard A. Bennett.)

The Court: That was the authority given to the firm by certain of the Kelley family, authorizing reinvestment?

Mr. Maxwell: Yes, distribution of additional shares.

Mr. Avakian: We have no objection to these being received in evidence, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 42.

Q. Now then, as I understand it, you reinvested these dividends paid to Dr. Kelley and the other account holders during the years 1950, 1951 and 1952? A. That is correct.

Q. And in that investment you have the fraction left over; in other words, the share would be so much and the dividend wouldn't come out even?

A. That is correct.

Q. And these individual checks which you have are the checks for the fractions?

A. That is right.

Q. May I have those please? These are broken down in accordance with account of Lois K. Kelley, Wayne P. Kelley, James Leighton, one account, and the other account, Wayne P. Kelley, James Leighton and Lois K. Kelley, the only difference between the two is that Mrs. Lois K. Kelley comes first on one and Wayne P. Kelley comes first on the other? [88] A. That is correct.

Mr. Maxwell: I will offer these two groups of checks as government's exhibit next in order, one

(Testimony of Howard A. Bennett.)

pertaining to Lois K. Kelley as the first exhibit, your Honor.

Mr. Avakian: We have no objection to these. I do not recall in what order. One group has the name of Wayne Kelley and the other Lois Kelley.

Mr. Maxwell: Lois Kelley first.

The Court: The group of checks in the name of Lois Kelley will be received as government's Exhibit 43. Check in the name of Wayne Kelley as first in order, will be received in evidence as government's Exhibit 44.

Q. Now, Mr. Bennett, have you brought with you today copies of your purchase orders; in other words, orders for purchase of stock?

A. Yes; I might point out the ones that are my brokers.

Q. But they are out of your original records?

A. They are out of my original records.

Q. May I have those orders. You have handed me actually two separate groups of these. You have them separated by brokers?

A. Yes, this order of July 24, 1952 was made through George McKaig & Company. These others are my brokers, Wilson, Johnson & Higgins.

Mr. Maxwell: I will offer these purchase orders as [S9] government's exhibit next in order.

Mr. Avakian: We have no objection to these, your Honor.

The Court: They will be received as government's Exhibit 45 in evidence.

Q. Now, Mr. Bennett, do you also have any doc-

(Testimony of Howard A. Bennett.)

uments which show the number of shares purchased in consequence of the reinvestment of dividends?

A. We have the history of the account which are in the files of the Crocker National Bank, their ledger sheet and shows the shares.

Q. They show acquisition of shares as made?

A. They do not differentiate between those reinvested and those that are outright purchase.

Q. For what period? A. These ledgers?

Q. Yes.

A. One begins on June, 1950 and the last date here, showing the balance of June, 1953.

Q. May we take these apart?

A. You may. This second account starts in November of 1952.

Q. Will you place them in proper order? Where did you secure these photostats, Mr. Bennett?

A. From the Crocker Anglo National Bank.

Q. And the Crocker Anglo National Bank keep them as part of their records and part of your records? [90]

A. They were, and are, custodian of the records.

Mr. Maxwell: I will offer these two groups of photostatic copies of ledger sheets, first one starting with the name of Lois K. Kelley and second starting with name of Wayne P. Kelley. May I amend my offer to exclude any entries on those sheets which might relate to the year 1953.

The Court: Very well, the offer of photostats, beginning with Lois K. Kelley first in order, will be received in evidence as government's Exhibit 46.

(Testimony of Howard A. Bennett.)

The group having the name of Wayne P. Kelley first in order will be admitted as government's Exhibit 47, subject to the restriction stated by counsel.

Mr. Avakian: May I make this inquiry? May it be understood, with respect to all of this information, we may have the right to move to strike, as was the ruling of the Court in connection with prior offers, and not have to make objection each time.

The Court: The motion, of course, can be made by counsel at any time he sees fit.

Mr. Avakian: I just want it understood that, in view of your Honor's ruling on the beginning group of exhibits, that related type of evidence, I wanted to make it clear in the record that they are going in in deference to that ruling and we would like to reserve the right to strike out any of the [91] evidence of this type.

The Court: It is the understanding of the Court that you have reserved the same objection to the same type of proof.

Mr. Avakian: Thank you, your Honor.

Q. Mr. Bennett, you have some more documents, showing the reinvestment of dividends in shares, such as perhaps carbon copies of papers?

A. Yes, I have the copy of checks sent out to the Technical Fund Distributors. I am missing two copies, that would be the two orders.

Q. May I have those. First, would you explain what information is on these sheets?

(Testimony of Howard A. Bennett.)

Mr. Avakian: Your Honor, may we see them first?

Mr. Maxwell: I just want to find out what they are, but I do not want the witness to read anything, just general information.

A. These show amount of dividend and price at which the reinvested new shares would be carried per share and total and the last figure indicates the excess amount.

Q. And that refers to the checks that go back to the fraction checks, is that correct?

A. That is correct.

Mr. Maxwell: At this time I will offer in evidence Technical Fund papers as described by the witness, showing information as to reinvestment of dividends. [92]

Mr. Avakian: We have no objection to these being received in evidence, reserving our right to strike.

The Court: The offer will be received in evidence as Government's Exhibit 48.

Q. Now, Mr. Bennett, do your records which you produce here in court, Exhibits 40 to 48, do they show the amount of stock purchased by Dr. Kelley or his wife, in dollars and cents, during the year 1949?

A. There were no transactions in 1949.

Q. During the year 1950?

A. Yes, sir, the sales and the other duplicates indicate the reinvested value.

Q. Let us break this down to an original invest-

(Testimony of Howard A. Bennett.)

ment which came from the stockholders.

A. That is correct.

Q. And the reinvestment of dividends from the original investment, is that the way it was?

A. The reinvested shares originate from the dividends and distributions, yes.

Q. First, can you look at your records and tell me the amount of purchase, original purchase, in 1950?

A. Do you wish that in total amounts or in orders?

Q. Total amount. The total cost of original purchase of Technical Fund stock by Dr. Wayne P. Kelley and Lois K. Kelley in the account for the year 1950. [93]

A. In the two accounts, that is, Wayne P. Kelley and Lois K. Kelley and Lois K. Kelley and Wayne P. Kelley, there were 8640 shares, at a cost of \$79,880.92.

Q. Now what did the doctor receive in the way of dividends during that year?

A. By the doctor, you mean in both accounts we are referring to?

Q. Yes, sir.

A. There was a total distribution of \$4,697 for the year ended 1950.

Q. Of that amount, how much was reinvested?

A. \$4,676.86.

Q. Then at the end of the year do you have the doctor's total investment in Technical Fund stock, cost value?

(Testimony of Howard A. Bennett.)

A. Speaking in dollars, his purchases and his reinvestments for the year totals \$84,557.78.

Q. Now for that year on the dividends, were the dividends wholly from income of the corporation, or were they in part a capital gain, that is, dividends resulting from this sale of stock by the company?

A. Speaking of 1950?

Q. Yes, sir.

A. Of the total \$4,697, \$3,998.20 was what we call from so-called income or investment, and the \$698.80 was dividends from capital gains, a \$198 gain. [94]

Q. Now I notice there was some \$21 dividends received in 1950 which were not reinvested, is that right?

A. \$20.14 was not reinvested.

Q. And what happened to that money?

A. Those are the checks which we have just seen. They were cashed.

Q. Were all those checks cashed?

A. All which checks?

Q. Well, speaking of the checks for the fraction of the leftover shares.

Q. Are we speaking for all years now?

Q. Yes, Exhibits 43 and 44.

A. No, in some cases, not in 1950 but in the other two years, those fractions were sent in with supplemental orders to make up one share.

Q. So in some cases those checks would be returned, together with additional funds?

A. That is correct.

(Testimony of Howard A. Bennett.)

Q. Did that happen in 1950?

A. That did not happen in 1950.

Q. In the year 1951, at the end of that year, can you tell me how many shares of stock of Technical Fund, Inc. were held by Dr. Kelley?

A. I will have to do some adding here. I have my 1951 figures separate from 1950. [95]

Q. Will you give me just the amounts acquired first during the year 1951.

A. For 1951 there were 4425 shares, totalling \$45,088.05 purchased and 491 shares are reinvestment, dividend distribution.

Q. There was an additional 491 shares?

A. Yes, as result of reinvestment of dividends.

Q. How much was the investment of those?

A. \$4564.33.

Q. And then what would be the total amount the doctor invested in Technical Fund stock in the year 1951? A. \$49,652.38.

Q. Now were there any sales during 1951 of 1950 stock, which I think you said was \$84,557.78?

A. There were no sales in 1950, no sales in 1951.

Q. This 49 thousand would be additional to that amount, is that correct? A. That is correct.

Q. What was the total amount of dividends in 1951? A. \$4,557.83.

Q. And how much of that was invested. I think you said some \$4,568.33 invested, is that correct?

A. That is correct figure from the account, but out of the dividends of \$4,557.83, \$4,541.32 was re-invested and \$21.01 was added to the dividend.

(Testimony of Howard A. Bennett.)

Q. \$21.01, that would be the fraction checks, plus additional [96] amounts, is that correct?

A. That is right.

Q. And how much of the dividends which were paid in, \$4557.83, were so-called income and how much were capital gain?

A. \$2155.68 were dividends from investments income, or so-called income, as you call it, and the dividend from capital gains on sales of the securities by the company was \$2402.15.

Q. Now let us go to 1952. How many shares were purchased during 1952?

A. 2,575 were purchased from George McKaig, previously mentioned, for a total of \$25,003.25.

Q. Were there any sales during the year 1952?

A. There were no sales.

Q. So this would be in addition to the amount purchased in the years 1950 and 1951?

A. That's right. Now we have mentioned just the purchases.

Q. Yes, that is correct. Then what were the dividends? How many shares were purchased by reinvestment dividends?

A. On both accounts there were 671 shares, totalling \$6,001.93.

Q. And that would give you the total amount of purchase for the year 1952 of how much?

A. \$31,005.18.

Q. What was the amount of dividends paid during the year 1952?

A. Dividends and distributions totalled \$5,970.48.

(Testimony of Howard A. Bennett.)

Q. And were those dividends all used to reinvest in stock shares?

A. Yes, the bulk of them were.

Q. I notice those are less than the value of investment.

A. Well, there was \$31.45 that was added to the dividend.

Q. In that year the total of all the dividends was used to purchase shares, plus \$31.45?

A. That is correct.

Q. Of the dividends of \$5,970.48, how much was ordinary income? A. \$2635.02.

Q. And how much was capital gains?

A. There were no capital gains.

Q. Now you have dividends of \$5970.48; ordinary, \$2635.02, what were the balance?

A. Well, the balance of \$3335.46 was distribution of paid-in surplus.

Q. Where do you get your information with respect to the difference in dividends and amounts between ordinary income and capital and distribution of paid-in surplus?

A. On a per share basis, as a matter of record. I also have the quarterly per share amount distributed.

Q. You have this as a portion of your record which shows the break-down between these different items of the dividends?

A. Yes, I have copies here. Working backward, we have at the conclusion of 1952, same as of 1951, I couldn't find the one [98] for 1950, however, I

(Testimony of Howard A. Bennett.)

have a copy of the quarterly report that does give the amounts for the last two quarters of 1950.

Q. May I have those? Do you recall when the first purchase of stock was in these accounts?

A. According to my records, in June, 1950 — June 21, 1950.

Q. Then would any of these statements prior to the one of September, 1950, have any application?

A. No. The purchases in June of 1950 were after the stock record date and therefore Dr. and Mrs. Kelley got no dividends for the end of June, 1950.

Q. The first dividends would be September?

A. That is correct.

Mr. Maxwell: I will offer these, showing dividend distribution for the latter end of the year 1950 and for the years 1951 and 1952.

Mr. Avakian: We have no objection.

The Court: The offer will be received in evidence as government's Exhibit 49.

Q. Mr. Bennett, you said something about paid-in surplus. The 1st dividends of 1952 are ordinary income. Would you explain that?

A. Paid-in surplus is return of investment, as far as the corporation goes. The ultimate result is a reduction of the shareholder's share cost at that time.

Q. In other words, distribution of capital of the corporation of stock? [99]

A. That is correct. That is return of capital.

Mr. Maxwell: I have no further questions.

(Testimony of Howard A. Bennett.)

Cross Examination

Q. (By Mr. Avakian): Mr. Bennett, I believe you have Exhibits 40 to 48 before you, is that correct, all the exhibits you presented?

A. I have——

Q. Let me give you 49 also. I wish you would refer to Exhibit 40, a group of dividend checks.

A. Yes, I have 40.

Q. Will you examine the endorsements on those checks? Would you tell me, from your examination, if it is true that those were all reinvested by either returning the checks to your company or leaving them with you?

A. May I remove the staple on these to examine the endorsements?

Q. Is that necessary? See if you can do it without.

A. Yes, these here, for instance, Exhibit 40, were not.

Q. So the checks were, in fact, deposited by the Kelleys in their own bank account, is that correct?

A. They went back to the Crocker Bank, so then the bank handled each for reinvestment.

Q. That is also true of checks in Exhibit 41, is it not, Mr. Bennett?

A. That is correct.

Q. Referring now to Exhibit 43. I believe you testified the [100] checks in that group represented the fractional portions of the dividends which were not used in purchasing shares because there was a little bit left over?

A. That is correct.

(Testimony of Howard A. Bennett.)

Q. Would you examine the checks in that group?

A. Speaking of Exhibit 43?

Q. Are those the checks in which Lois Kelley's name is shown?

A. That is Exhibit 43.

Q. Would you examine the checks, beginning with April 3, 1951 and running through to December 30, 1952, and tell me if it is not true that those were likewise returned directly for reinvestment?

A. Which ones did you wish?

Q. I believe April 3, 1951 is the first one in the category I mentioned.

A. The first one is January 16, 1951.

Q. Beginning with April 3, 1951.

A. That is right. April 3rd is for 13 cents. That indicates reinvestment here.

Q. And all of the rest of the checks subsequent to that date, running to the end of 1952 in that exhibit, likewise were returned for reinvestment, were they not?

A. I will have to refer to the year.

Q. Would it help you to look at the endorsement?

A. Not necessarily. This one is for 56 cents, the end of June. That was cashed.

Q. What date is that?

A. The end of June, 56 cents; it was cashed.

Q. What year? A. 1951.

Mr. Maxwell: What exhibit are you referring to?

A. Exhibit 43. We started out with the second check, 13 cents, in April.

(Testimony of Howard A. Bennett.)

Q. I direct your attention to the next check, January 8, 1952.

A. Yes, that was sent back with supplemental amount.

Q. Will you look at all the remaining checks for 1952? A. That is correct.

Q. Those were all reinvested?

A. Yes, in 1952.

Q. Would you look at 1952 checks in Exhibit 44, which are checks on which Wayne's name appears first, and tell me whether those were all reinvested?

A. Yes, March 31, 1952, in amount of \$4.06, was handed for reinvestment, as was June 30th for 20 cents, September 30th for \$5.00, a year end one, \$2.09.

Q. January 8, 1952, also?

A. Yes. That actually results from the end of the year 1951, and that was also reinvested.

Q. Now with regard to the purchases which were made in each of these years—first, did you give a total number of shares and [102] total number of amounts—the amount purchased in 1952 was purchased through George McKaig Company, is that right?

A. We have the orders here yes, 2575 shares were purchased through George McKaig Company.

Q. As to 1950 and 1951 purchases, those were made through Wilson, Johnson & Higgins, were they not? A. That is correct.

Q. And the money came to you through that brokerage firm? A. That is correct.

(Testimony of Howard A. Bennett.)

Q. That wasn't money coming directly from Dr. Kelley? A. No.

Mr. Avakian: Your Honor, so there will be no confusion, I would like to call the jury's attention to the fact that the amounts of money specified in the exhibits relating——

Mr. Maxwell: He can argue the case.

Mr. Avakian: There are large amounts floating around here and that is improper——

Mr. Maxwell: I object to the remarks of counsel.

The Court: This testimony was offered and you did not make an objection at that time. I do believe it is out of place to exhibit an argument to the jury.

Q. Now, Mr. Bennett, I wasn't able to follow exactly the addition which you gave in your direct examination. Would you refer to your records, I believe they are in Exhibit 48, which [103] show the purchase in 1951, and particularly to the dividends and to the shares purchased with dividends.

A. I have Exhibit 48 in front of me now.

Q. Do you have the data in regard to the year 1951? Perhaps you may have been using other memorandum in your possession.

A. I might call attention to the fact that these copies in Exhibit 48 are duplicates or triplicates, referred to in the exhibits.

Q. Would you refer specifically to the amount of dividends for 1951 and the amount of shares purchased by reinvestment through dividends in 1951, and perhaps I can straighten out my views.

(Testimony of Howard A. Bennett.)

A. What do you wish me to refer to now?

Q. What is the total amount of dividends for that year?

A. For the year ending December 31, 1951, \$4,557.83 of dividends and distribution.

Q. And what was the amount of money reinvested?

A. \$4,541.32, plus supplemental \$23.01.

Q. Thank you very much. Referring again to Exhibit 48, you stated that there were sheets for two quarters missing?

A. That is correct.

Q. You didn't give the description of sheets missing. What type of sheets are they?

A. They are the duplicate or triplicate entitled, "Dividends to Reinvest," with a couple of checks in Exhibits 44 and 43.

Q. Have you made a search, or had a search made, in your office? [104]

A. I looked for them. I compiled the information myself.

Q. Those two were lost and missing?

A. Those two I couldn't find.

Q. And I take it you made an extensive search for them to satisfy yourself there was no point in looking further?

A. That is correct.

Q. You also talked about not being able to find the tax status form for 1950?

A. That is correct.

Q. That is with respect to Exhibit 49?

A. I did see the quarterly forms, which were broken down.

(Testimony of Howard A. Bennett.)

Q. But you did find those forms for 1951 and 1952, but could not find them for 1950?

A. I could not.

Q. So that is another document which you lost?

A. That is right.

Q. With respect to the distribution of paid-in surplus in 1952, I believe you said the amount of that was \$3335.46? A. Yes.

Q. Is it true, Mr. Bennett, that payment of that amount in the form of a dividend—

A. I called it a distribution, sir.

Q. I think you are right. The payment of that as a distribution represents a tax-free return of capital to the investor?

A. May I read that portion out of the tax form? It may make it [105] clear.

Q. That is part of 49? A. Yes.

Q. If you please.

A. It says: "The amounts shown in the last column were distributions from paid-in surplus. Since they therefore are to be considered a return from capital they are non-taxable, and do not have to be included in Form 1040."

Ex. 100

Redirect Examination

Q. (By Mr. Maxwell): Mr. Bennett, about how many records, pieces of paper, did you bring here this morning? A. That would be a guess, sir.

Q. Well, make your best guess.

Mr. Avakian: Your Honor, they are in evidence, he can count them.

(Testimony of Howard A. Bennett.)

The Court: He is trying to.

Q. About how many pieces of paper did you bring?

Mr. Avakian: Your Honor——

The Court: Let us just hear.

A. I am a poor guesser, but I would say the pieces of paper I have here, including torn off slips, are 250.

Q. And there are three of them missing, it is my understanding? A. Yes.

Mr. Maxwell: That's all. [106]

Recross Examination

Q. (By Mr. Avakian): Is that a fair norm for your organization?

A. Yes, sir, we are successors of Technical Fund——

Mr. Maxwell: The Internal Revenue didn't have them.

Mr. Avakian: What was your answer?

A. I didn't answer.

Mr. Avakian: I would like an answer.

A. I don't know. I will not say they are lost; I will say I couldn't find them.

Q. Did the Internal Revenue Service examine these records in your office prior to your coming?

A. Not in my office.

Q. You don't know whether they did examine them?

A. No, they have never examined any of these records until today, when I reported.

(Testimony of Howard A. Bennett.)

Mr. Maxwell: I did examine them though today?

A. This morning.

(Witness excused.)

(Jury admonished and afternoon recess taken
at 2:55 p.m.)

3:10 P. M.

Defendant present with counsel. Presence of the
jury stipulated.

GEORGE B. McKAIG

a witness on behalf of the plaintiff, being duly
sworn, testified as follows: [107]

Direct Examination

Q. (By Mr. Maxwell): Will you state your
name? A. George B. McKaig.

Q. Where do you reside, Mr. McKaig?

A. Half way between here and Reno.

Q. What is your occupation, sir?

A. Right now it is nothing.

Q. What was your occupation during 1950, 1951
and 1952? A. Investment broker.

Q. Mr. McKaig, did you purchase for Dr. Kelley
some shares of Technical Fund stock?

A. Yes, sir.

Q. Do you have a memorandum of that purchase? The witness has handed me a yellow sheet containing confirmation and statement in the name of George B. McKaig & Company, dated July 24, 1952. I will ask that that be marked for identification.

(Testimony of George B. McKaig.)

The Court: It will be marked plaintiff's Exhibit 50 for identification.

Mr. Avakian: We have no objection to this going in evidence, your Honor.

Mr. Maxwell: We offer it.

The Court: It will be received in evidence as government's Exhibit 50.

Q. Showing you government's Exhibit 50 in evidence, Mr. McKaig, can you tell us what that means? [108]

A. This is a statement of the Technical Fund purchase of 2575 shares at \$9.71 per share.

Q. What is the total amount?

A. \$25,003.25.

Q. Did Dr. Kelley pay you that amount of money? A. He paid me that in cash and check.

Q. Do you recall how much the currency was and how much check?

A. I haven't my bank accounts here, statement here.

Q. Did you make a deposit of that amount of money in your bank account on or about that date?

A. Yes.

Q. That would be July—— A. July 24th.

Q. 1952? A. Yes, sir.

Mr. Maxwell: I have no further questions.

Cross Examination

Q. (By Mr. Avakian): What was the name of the bank in which you deposited this money?

A. I carry accounts in two banks, but I think this was the Nevada Bank of Commerce.

(Testimony of George B. McKaig.)

Q. In Reno? A. Yes.

Q. Where was your other account?

A. First National. [109]

Q. In Reno? A. Yes.

Mr. Avakian: That is all, your Honor.

Redirect Examination

Q. (By Mr. Maxwell): Do you remember whether or not there was a refund made on this purchase of stock? A. I do not know.

Q. You don't remember; all right. I think that is all.

(Witness excused.)

MRS. BESSIE M. TRACY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): Mrs. Tracy, will you state your full name for the purpose of the record please? A. Bessie M. Tracy.

Q. Where do you live?

A. Part of the time in Florida and part of the time in New York State.

Q. Were you at one time known as Bessie M. Barbour? A. Barbour.

Q. That was your former name or your maiden name? A. That was my former name.

Q. And you had that name during what years, do you remember?

A. Well, I think about 1936 I married Dr. Tracy.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Now you appear here pursuant to a subpoena issued by me, do [110] you not? A. Yes, I do.

Q. Mrs. Tracy, you are acquainted with Dr. Wayne P. Kelley, are you not?

A. Yes, I am very well acquainted.

Q. And you recognize him here in court, do you not?

A. Well, he doesn't look like the same person.

Q. That is the person sitting at the end of the table. You were at one time related to the doctor, is that correct? A. He married my daughter.

Q. Do you recall when you first met the doctor?

A. Yes, I do.

Q. When, to the best of your recollection?

A. Well, he met my daughter——

The Court: I think the witness misunderstood.

Q. Do you recall when you first met the doctor, to the best of your recollection?

A. You mean what year?

Q. Yes.

A. Well, three or four years before 1929, somewhere around there, maybe four or five.

Q. Just to the best of your recollection.

A. Yes.

Q. Did he come to your home on occasion?

A. Oh, yes, very, very often. [111]

Q. Will you explain to the jury and to the court approximately how often he would come to your home?

A. Well, in the first few years, when my daugh-

(Testimony of Mrs. Bessie M. Tracy.)

ter was a student at high school, he used to come twice a week.

Q. Where was this?

A. In Hamilton, New York.

Q. And this was in the years before he married your daughter? A. Yes.

Q. Do you recall what the doctor was doing at that time? A. He was in Colgate University.

Q. Were you acquainted with the doctor's family? A. Yes.

Q. Where did they reside?

A. About six or seven miles, a few miles, out of Hamilton in a small suburb called Hubbertsville.

Q. Do you recall whether they lived in the city or in the country?

A. They lived in the country.

Q. Can you describe their home? Was it a farm? A. It was a farm, yes.

Q. Do you know how large it was?

A. No, I don't. I don't know the exact size.

Q. Do you recall what they raised on the farm?

A. I don't recall they raised anything at the time. I think they kept some cows. [112]

Q. Did they have any hired help?

A. Well, not that I know much about. I don't think so.

Q. Do you recall having visited the farm on occasion? A. Yes, very often.

Q. Do you recall what years this was?

A. It was before my daughter married and afterwards for a short time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. When was your daughter married?

A. She was married Christmas Day in 1929.

Q. Did you keep in contact with your daughter and the doctor after they were married?

A. Oh, yes, they lived with me part of the time.

Q. How long did the doctor and your daughter remain married, to the best of your recollection?

A. Well, I think the children were about three or four years old—from 1929—I think the children were three or four years old; I can't tell the years.

Q. Do you recall how long after they were married the first child was born? Was it several years?

A. He finished Johns Hopkins, took about three years, and a year intern—it was the year the oldest child was born, so that would be around——

Q. Let me see—was the doctor going to medical school when your daughter married him?

A. Yes, he had completed one year and half of the next. Perhaps [113] not half, but I think the first vacation time.

Q. Do you recall how many years he went to medical school? A. Four.

Q. And the oldest child was about four when the parents were separated, is that your testimony?

A. Yes.

Q. That would make it about 1936 or '37, is that correct? A. I think that is right.

Q. I don't want to put the words in your mouth.

A. I am going to correct that. I believe they didn't separate until after '38. It was after Dr. Tracy died, so I think it was around '38 or '39.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Then it was up until this time that you were in close contact with the family?

A. That's right.

Q. Do you have any personal knowledge of the financial status or the ability, financial ability, of the doctor during the course of the marriage, during the period of the marriage?

A. During the time my daughter was his wife, do you mean?

Q. Yes, do you have any knowledge of his financial status at that time?

A. Well, at the time he was in college——

Mr. Avakian: May that be answered yes or no?

Q. Just answer whether you know or don't know. A. I do know. [114]

Q. Did you on occasion lend him money?

A. Yes, I did.

Q. Would you explain to the jury and to the Court the occasion, or upon what occasions, you lent him money, to the best of your recollection now.

A. Well, I really can't define the times that I loaned him money, because it was just continuously. For the fact of the matter, I gave him and my daughter a regular allowance, beginning the year after they were married in 1929 and beginning the next October, when he went back to school, that next year I gave them a regular allowance during his whole college course at Johns Hopkins University, and they also stayed with me part of the time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. What was the reason for your giving him an allowance?

A. Because they had no finances; they had no way of going through school. They didn't have help.

Q. Now you have certain records of financial transactions with the doctor, do you not?

A. Well, I believe I have some letters that he wrote me, asking for financial assistance.

Q. And these letters have been where over this period of years? A. In my own safe.

Q. Until they were delivered to me last night?

A. That's right.

Q. Mrs. Tracy, I show you what purports to be an envelope [115] addressed to Mrs. F. T. Barbour, Hamilton, New York, and I ask you if you can identify that? A. Yes, I can.

Q. Is the letter dated?

A. No, it isn't, but the envelope is.

Q. Is that the letter that was in the envelope that I have handed to you when it was delivered to you? A. Yes, it is.

Q. Can you see the postmark on it?

A. Yes, I can.

Q. What date is it postmarked?

A. February 1, 1930.

Q. And where is it postmarked?

A. Postmarked Baltimore, Maryland.

Q. By whom is the letter signed?

A. "Lot of love, your son."

Q. Is there any other name? Can you identify

(Testimony of Mrs. Bessie M. Tracy.)

the writer? A. Oh, yes.

Q. Who is the writer? A. Wayne Kelley.

Q. Do you have any other sons? A. No.

Q. Any other son-in-law? A. No.

Mr. Brown: We would like to have this marked for [116] identification as plaintiff's exhibit next in order.

Mr. Avakian: Your Honor, if we may see it, I think we will have no objection; it can be marked directly in evidence.

The Court: Yes, all right.

Mr. Avakian: No objection to this being received in evidence.

Mr. Brown: We will offer it.

The Court: The offer will be received as government's exhibit 52, the letter and the envelope together.

Q. Would you read that please, or would you prefer that I read it?

Witness reads Exhibit 52.

"The Bungalow

Sunday.

"Dearest Mother,

"Betty and I just took Mrs. Taylor home. She came over for dinner and we had that canned chicken which was very tender and certainly hit the spot.

"Well, so far we have the desk & chair, (and its a pippin—every one of the boys wish they had one now); the Davenport suit & mattress; the kitchen cabinet, white table and white refrigerator; con-

(Testimony of Mrs. Bessie M. Tracy.)

golium; rug (which looks fine with our blue suit); bridge lamp, smoking stand; [117] John is giving us a bridge table; then we have a nice new bed with Simmons spring & mattress—and its some bed; also we have bought aluminum ware, everyday plates, more dishes (and have to get more pink pieces); broom, mops and still find that the lady of the house wants something every day. The curtains are up and when the hope chest gets here—I hope we will be settled in the nicest apartment in Baltimore. I also got a dark suit and top coat, a haemocytometer and 2 more books which means we have spent (including last months store bill, and room rent, and garage) a little over \$500.00, in other words after this months rent & garage is paid \$48 I will have about \$90 left, and if I go back to the Rotary Club they will do the same thing as with Wayman who got married, after which they refused to lend money.

“Tomorrow next semesters tuition is due \$310—about \$30 lab. fee—and my fellowship has not come thru as yet—consequently I need about \$500 as soon as possible (have waited 'til the last min. to hear from the fellowship). If you could send it with a note for me to sign, or would rather fix it up Easter, or any way suits me. Anyhow I hope this sudden news will not inconvenience [118] you too much. If the loan comes thru I will send it to you immediately if you want to invest or just put it on interest.

“Now that that is off my mind, we are intending

(Testimony of Mrs. Bessie M. Tracy.)

to join the army and the first 3 years out I get \$3000 a year—(which includes allowances for living expenses) or \$3,152.00 to be exact—and if I go to camp this summer \$200 which is paid during my last year here (6 weeks at camp).

“John and his girl friend are coming over this evening to play some bridge. Friday night we played with the Maccubins and last night after I studied from noon ’til 9 we went to a show. Since John saw our apartment he has decided definitely to get married this summer, and I don’t blame him. It’s the only thing and I hope soon to get a hard and fast schedule so I can keep my work up. When that gets adjusted we’re just sitting pretty.

“Right now this little wife is right here wanting to be petted or something, so you understand the dishes are done and she is out of a job, but I’m getting hungry again.

“Bet wants to read this now and says I must finish so she can,—so the bungalow will sign off with everybody happy and feeling better than [119-120] the gov. of Maryland.

“Lots of love,

“Your son.

“Forgot to tell you that Betty is making me a pair of pajamas.”

Mr. Brown: I would like to have marked as plaintiff’s exhibit next in order, for identification, promissory note dated February 15, 1930, in amount of \$500.

(Testimony of Mrs. Bessie M. Tracy.)

The Court: It may be marked government's Exhibit 53 for identification.

Mr. Avakian: Your Honor, we have no objection to its going in evidence if it will save extra marking by the clerk.

Mr. Brown: We will offer it then.

The Court: Very well, it will be received in evidence under the same number.

Q. I show you plaintiff's Exhibit 53 and I ask you if you recognize that? A. Yes.

Q. Would you kindly tell the Court and the jury what that is?

A. That's the note for \$500 that I sent to him at his request in that letter.

Q. I note that it is endorsed on the back, is that correct? A. Yes, my daughter also signed it.

Q. Was the note paid?

A. No, not any one of them. [121]

Q. Are you acquainted with the W. F. Pryor Company, Inc.?

A. I am not acquainted with them but I know of them, and they are sellers of medical goods, publishers as well—I don't know just what.

Mr. Brown: I would like to have marked for identification drawn on the National Bank of Hamilton March 19, 1932, in the amount of \$30, signed by Bessie M. Barbour.

The Court: It may be marked Exhibit 54 for identification.

Q. Mrs. Tracy, I show you government's Exhibit 54 for identification and I ask you if you recognize

(Testimony of Mrs. Bessie M. Tracy.)

that? A. Yes, I do.

Q. Would you kindly tell the Court and the jury what it is?

A. Well, it is a check in payment for some surgical books Dr. Kelley asked me for and he filled it out and I signed it.

Q. Is that your signature at the bottom?

A. That is it.

Mr. Brown: We offer this in evidence as plaintiff's Exhibit 54.

Mr. Avakian: No objection.

The Court: The offer will be received as government's Exhibit 54.

Q. Was it customary for you to purchase the doctor's books and make payments on them?

A. That particular time he asked me and I said I couldn't give [122] to him. He said it cost \$125, the full set, and I couldn't afford to give it, plus giving them their regular allowance, so I gave it to him as I could to pay it in installments.

Q. Did you know an Ernest Brockridge?

A. Yes, very well.

Q. Tell the jury who he was.

A. He was the landlord of my daughter and Dr. Kelley at the time he was intern at Strong Memorial Hospital in Rochester, New York.

Mr. Brown: I would like to have marked for identification check drawn on the National Bank of Hamilton, dated October 20, 1932, in the amount of \$10, signed by Bessie M. Barbour.

The Court: It may be marked Exhibit 55.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Now I show you plaintiff's Exhibit 55 for identification and I ask you if that is your signature? A. Yes, it is.

Q. Would you tell the Court and the jury what that check was given for?

A. It was given to their landlord for rent, to Ernest Brockridge.

Q. Was it customary for you to help them with their rent? A. Yes, it was.

Mr. Brown: We offer the check in evidence as plaintiff's Exhibit 55.

The Court: The exhibit will be so received, government's [123] Exhibit 55.

Mr. Brown: I would like to have marked for identification letter undated, with the title, Strong Memorial Hospital, 216 Crittenden, Rochester, New York, signed, "Wayne, Betty and Doc", together with envelope postmarked June 5, 1933, addressed to Mrs. F. G. Barbour, as one exhibit.

The Court: Plaintiff's Exhibit 56 for identification.

Mr. Avakian: We have no objection to its going in evidence.

Mr. Brown: We will offer it in evidence.

The Court: The offer is received in evidence as government's Exhibit No. 56.

Q. I show you government's Exhibit 56 and I will ask you to tell the Court and jury what that is.

A. Shall I read it?

Q. Yes.

Witness reads Exhibit 56:

(Testimony of Mrs. Bessie M. Tracy.)

“Dear Grandman,

“Took Betty over to chickies yesterday Dolly Hunt is going over to help her with eats & getting a woman today. Need about 15 bucks on a rush order. Will get basket etc. when money comes. Dad Broadbridge is going to help me with hosp. bill.

“A happy and “brokr” family [124]

“Wayne, Betty & ‘Doc’ ”

Q. Does that letter have a letterhead?

A. Yes, Strong Memorial Hospital.

Q. Is it dated? A. No, it is not.

Q. Is that the envelope which enclosed the letter? A. Yes, it is.

Q. What is the postmark?

A. Rochester, 5:00 p.m.

Q. What year? A. 1933.

Mr. Brown: I wish to have marked for identification check drawn on the National Pendleton Bank, dated March 5, 1932, in amount of \$20, signed by Bessie M. Barbour.

The Court: It may be marked plaintiff’s Exhibit 57 for identification.

Q. I show you plaintiff’s Exhibit 57 for identification and I ask you who is the check made out to?

A. Bessie Barbour.

Q. It is signed by whom?

A. Bessie Barbour.

Q. By whom was it endorsed?

A. James P. Durkee, who was their landlord at Johns Hopkins; also I think he kept a small grocery store underneath where they lived. [125]

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you have any recollection of this exhibit?

A. Where it went?

Q. Do you know where it went?

A. Yes, I know—James Durkee.

Q. It went for rent, is that correct?

A. I don't know whether it went for rent or groceries, I wouldn't know.

Q. Was it given to the doctor or your daughter?

A. I don't recall which.

Q. Do you recall if it was given to one or the other? A. That's right.

Q. It was. We offer the check in evidence as plaintiff's Exhibit next in order.

Mr. Avakian: We have no objection, your Honor.

The Court: The offer will be received as government's Exhibit 57 in evidence.

Q. Now you have mentioned that you gave the doctor and your daughter an allowance?

A. That's right.

Q. Do you recall whether that amount was paid every month?

A. Well, it wasn't too regularly. Sometimes when they came home and started away, at the beginning of the semester, they took the money with them sometimes before the second or third month and sometimes I sent a check to them.

Q. Do you recall whether these payments were made to the doctor [126] or to your daughter, or to both?

A. Well, it was for their living expenses.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you recall if you made the checks payable to one or the other, or did you make them payable to both, if you recall? A. I don't recall.

Q. Is it possible——

A. It is possible some went to my daughter and some to the doctor.

Q. What was your daughter's name?

A. Elsbeth Kelley.

Q. And you called her—— A. Betty.

Q. Do you recall over what period of time you gave her this allowance?

A. The remainder of '29—I wasn't aware that I would have to contribute so much to their support, so I didn't promise any regular amount that year of 1929 and 1930, but when he went back to Johns Hopkins in October, I believe September or October, the beginning of the semester, I told them I would try to see that they had \$75 regularly every month from then on until he finished Johns Hopkins.

Q. You don't recall what year he finished Johns Hopkins?

A. Well, he was there four years, and started a year before 1929, so that would be 1928—four years.

Q. Now, Mrs. Tracy, do you have any recollection of the doctor's [127] nature of employment during the summer of 1930?

A. Well, when he came home, came to my home every year, he had no employment and no idea of what he was going to do, so I suggested that to him, "Why don't you truck peas to New York." He said,

(Testimony of Mrs. Bessie M. Tracy.)

"I have no car." I said, "You could hustle one, you know people you should get started hauling truck to New York or Philadelphia." So I loaned him \$200 at that time to buy a small Ford truck.

Q. Do you have any recollection of the financial arrangements you made with him at that time for repayment of the \$200, or was it a gift?

A. Well, I knew he couldn't pay me anything until he was established in his practice, because he had nothing to pay with, so he wasn't expected to. He just said he would pay it back when he could, when he got established in practice.

Q. Did he pay you back that \$200?

A. No.

Q. Do you recall what he did the second summer? A. He did the same thing, I believe.

Q. Did he borrow money from you then?

A. No, he didn't; I didn't lend him money.

Q. Did he ask for it? A. No.

Q. Do you believe he did?

A. I believe he did. To the best of my ability, I believe he [128] borrowed \$300——

Mr. Avakian: Just a moment—I think there should be something, not speculation. I think counsel should lay a better foundation.

The Court: Yes.

Mr. Brown: I asked her if she had any recollection. I believe she testified she did have recollection. That is all she testified to that could be evidence and I agree with counsel, it shouldn't go beyond that point. I won't inquire any farther.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you recall a transaction involving the purchase of a motor vehicle by the doctor, a Model A Ford? A. Oh yes, I do.

Q. Would you explain to the Court and the jury the nature of that transaction?

A. Well, he kept telling me he thought it was too much for my daughter to ride back and forth to Baltimore in the car that his parents had given him, a two-passenger Ford, and he wanted to buy a new one and he asked me if I would help him and I said yes, so I believe I told him I would try to contribute \$20 a month toward it.

Q. Did you make these payments on the automobile?

A. No, I didn't, I gave it to Dr. Kelley. It was a small community, I didn't want to embarrass him too much.

Mr. Avakian: I will ask that that last be stricken. [129]

The Court: It is explanatory as to why the money was paid to him. However, it may be stricken.

Q. Mrs. Tracy, do you mind telling the Court your age? A. I am over seventy.

Mr. Brown: Thank you. I believe that is all. You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mrs. Tracy, I believe you told us your daughter and Dr. Kelley were married Christmas Day, December of 1929, is that your recollection?

(Testimony of Mrs. Bessie M. Tracy.)

A. I believe that is correct.

Q. Do you recall when it was that they were divorced?

A. 1939 or '40, somewhere in there. I can't tell the exact year.

Q. Were they separated for some time before the divorce? A. I believe about two years.

Q. Your daughter obtained the divorce in Florida? A. Yes, she did.

Q. Prior to the separation, was there a period of time when they were having marital difficulties between themselves?

Mr. Maxwell: I object to this line of testimony. This witness has testified to the financial transactions she had with the defendant, Wayne P. Kelley, and she has also testified to the financial circumstances of the defendant. There has been no other testimony from this witness. It is beyond the scope of direct examination. If counsel wishes to call this [130] witness as his witness at a later date, it will be satisfactory with the government.

Mr. Avakian: Your Honor, I think counsel for the prosecution developed this subject of the marriage and relationship between the two and with the mother. I think this is proper cross-examination.

The Court: I do not think so. I think the witness stated the conditions.

Mr. Avakian: We will defer that matter until later, your Honor. I refrained from objecting to the questions. I was not familiar with the court's procedure—voluntary information.

(Testimony of Mrs. Bessie M. Tracy.)

Mr. Maxwell: I object to characterization of the witness' testimony.

The Court: Comment on the witness' testimony is stricken. The jury is admonished to not consider that. The Court has previously said the Court will give you the law as to how you perform your duties and judging the credibility of the testimony. The Court will also advise you remarks of counsel do not constitute testimony and that you, yourselves, are the sole judges of the weight and credibility of testimony of the witnesses.

Q. Mrs. Tracy, you testified that prior to the time that Dr. Kelley and your daughter were married, you visited the farm of [131] his parents frequently and that you continued to visit the farm of his parents for a short time after the marriage. Can you tell us approximately how long after the marriage you continued to do this?

Mr. Maxwell: May I request that the question be reframed? It did not contain summary of the witness' testimony and counsel did not ask the witness if she had so testified.

Mr. Avakian: I think I have the exact language.

The Court: You may proceed, counsel; restate the question.

Q. Do you recall testifying that you visited the farm of Dr. Kelley's parents for a short time after the marriage?

A. A short period, not a short length of time perhaps—well, his mother was at my house after my husband died, which was in 1938 and between then

(Testimony of Mrs. Bessie M. Tracy.)

all the time we went back for a party or a dinner, or they were at my house.

Q. Where were Dr. Kelley and your daughter married? A. In Hamilton, New York.

Q. In your home? A. Yes.

Q. And it is true, is it not, that no member of Dr. Kelley's family attended the marriage?

A. That is true.

Q. And you stated that while Dr. Kelley was in medical school, during summers and during vacation periods, he and your daughter [132] stayed at your home. Do you recall your testimony?

A. Yes, they did.

Q. And they didn't stay at the home of his parents?

A. That's true. They went there for a visit every Sunday, visit; they didn't stay there.

Q. Incidentally, do you have any checks with you, other than those that you presented here? May the record show that counsel for the prosecution has handed me one check. May I inquire of counsel whether *there any* other checks?

Mr. Brown: No other checks.

Q. I show you what purports to be check dated March 20, 1937. Will you examine that, please?

A. Yes, it is dated March——

Q. Just a moment. We have to follow certain rules, Mrs. Tracy. Do you recognize the signature?

A. My signature.

Q. That is your signature? A. Yes.

Q. And do you recall the circumstances of the

(Testimony of Mrs. Bessie M. Tracy.)

issuance of the check? A. No, I don't.

Q. Do you recognize the signature of the endorsement on the back? A. Yes, I do.

Q. Is that the signature of the party whose name is on the check? A. That is right. [133]

Q. Did you deliver this check to this party?

A. Yes, I did.

Mr. Avakian: I will offer this in evidence, your Honor.

Mr. Brown: We have no objection.

The Court: The offer will be received in evidence as defendant's Exhibit A.

Mr. Avakian: For the information of the jury, I would like to state this check is dated March 20, 1937, drawn on the First National Bank of Hartford, Connecticut, payable to Dr. W. P. Kelley, in amount of \$5.00, signed Bessie M. Tracy, and endorsed W. P. Kelley.

Q. I believe you testified that you do not recall the circumstances of the issuance of the check?

A. I do not.

Q. Mrs. Tracy, while Dr. Kelley and your daughter were living in Baltimore, during the time he was attending Johns Hopkins, did you occasionally visit them? A. Oh, yes.

Q. And in regard to this check for \$20, which is Exhibit 57, the check for \$20 on March 5, 1932, which is signed by you and payable to you and then endorsed by you and by A. P. Durkee, you remember you stated you were not entirely certain of the purpose for which that check was issued?

(Testimony of Mrs. Bessie M. Tracy.)

A. I said I didn't know whether it went for food or for rent. [134]

Q. Is it possible that that was a check which you cashed in Mr. Durkee's grocery store, for the purpose of obtaining cash for yourself while you were visiting there? A. No, I think not.

Q. Can you think of any explanation as to why you would have made this check out to yourself, rather than directly to Mr. Durkee?

A. I can't answer that.

Q. Does my calling to your attention suggest to you the possibility that you may have been cashing a check for your own purpose?

A. I don't think so. I went there by automobile and returned the same way and I would not have any purpose for it.

Q. You didn't spend any money while you were there?

A. I wouldn't say that I didn't spend any money, but I am sure I had money to pay my expenses before I went to see them.

Q. With regard to the \$10 check to Mr. Brockbridge in October of 1932, I believe you testified that he was their landlord, is that correct?

A. That is the time the doctor was intern at Strong Memorial Hospital.

Q. In Rochester? A. Yes.

Q. Do you now have a personal recollection of this gentleman named Ernest Brockbridge? [135]

A. Do I have a personal recollection of him?

Q. Is this just a name?

(Testimony of Mrs. Bessie M. Tracy.)

A. I visited my daughter when she lived in the apartment above Mr. Brockbridge's store, who was their landlord. He is the same party the doctor referred to, calling him "Dad" and helped to pay my daughter's expenses at the time the baby was born. He had to have \$15 when they brought the baby home.

Q. If you would like to see the checks, I would be glad to hand them to you, Mrs. Tracy. I will hand you Exhibit No. 55, the \$10 check to Mr. Broadbridge. If that will refresh your recollection, you may use it.

A. Yes, I believe the check speaks for itself, made out to him and endorsed by him.

Q. Do you know in whose handwriting the check is made out?

A. That is my own handwriting.

Q. Do you know how much rent Dr. and Mrs. Kelley were paying each month to Mr. Broadbridge?

A. It was a very nominal rent, because the doctor was living at the hospital and my daughter was pregnant and they were living with another young doctor and wife who were in similar circumstances, same hospital, and I think their rent was very small. What it was, I don't remember. I think it was around \$20. My daughter paid for each one, I believe. I am not going to testify to that because I am not sure.

Q. I would not expect you to remember after all these years. [136]

A. It is a long time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Did you stay with them in Rochester yourself?

A. Oh no, I never stayed with them. I have never stayed with them.

Q. Do you have a specific recollection now of this \$10 check?

A. Just a minute. You asked me if I stayed—I stayed about a week in my life and those times I did stay was when the doctor sent for me to take care of the oldest little boy when this boy was born in St. Elizabeth's Hospital, and I believe I stayed in his house quite some time and took care of the boy.

Q. I was only asking about Rochester. I simply asked you whether you *stayed them* in the apartment in Rochester.

A. No, I did not.

Q. Do you have a recollection now of giving this \$10 check to Mr. Broadbridge, or are you simply testifying from what the check indicates, without any independent recollection? I don't know if you understand.

A. I think I said before this check speaks for itself.

Q. What I am trying to find out is whether, independently of the check, you have your own recollection what it was for, or whether you are simply stating what the check says?

A. What else could I do?

Mr. Brown: I will have to object to that question. If she did, the objection would have been interposed to the introduction of the instrument, on

(Testimony of Mrs. Bessie M. Tracy.)

the ground that she had an [137] independent recollection. The instrument went into evidence as her recollection, I believe.

Mr. Avakian: We are entitled to cross-examine.

The Court: Well, proceed, gentlemen.

Q. I will ask one more question about this ten dollar item. What I am trying to find out is, do you now, in 1956, remember the purpose for which you gave Mr. Broadbridge the ten dollar check, or are you simply basing your testimony on your interpretation of the check itself?

A. Well, they had no money whatsoever, they had no income, so how can I assume it was for anything but toward their rent?

Q. You are assuming?

A. How could it be anything else?

Q. I am only asking whether you are assuming it or whether you remember independently? I take it you are assuming.

The Court: She stated she doesn't remember.

Mr. Maxwell: That is my recollection, your Honor.

Q. You stated in the summer of 1930 you suggested to Dr. Kelley that he go into the business of trucking peas to New York or Philadelphia or some other place, do you recall that testimony?

A. Yes, I did.

Q. Do you recall your testimony about his trucking peas? A. I believe I do.

Q. And you said that with the assistance of a loan from you, he [138] bought his own truck and

(Testimony of Mrs. Bessie M. Tracy.)

went into that business that summer? A. Yes.

Q. Do you recall what the nature of that business was—only if you recall?

A. Oh yes, I recall.

Q. Did that consist of buying produce?

A. No, he never bought any produce. He took it as an express, just as express, so much a bushel. He had a small Ford truck.

Q. Do you recall what prompted you to suggest that he go into this trucking of peas?

A. Because he had nothing to do and no income and he could only do something in the summer time, until he went back. It seemed a feasible thing to do.

Q. And you say he continued with this same business in 1931? A. Yes.

Q. Do you recall whether he had any assistants or other people in the conduct of this business?

A. My daughter made every trip except one or two, the whole time of that 123 miles.

Q. She drove with him?

A. She drove with him every single day. He left my home about three or four o'clock in the morning and filled his truck and I got up and got their breakfast and seen them off.

Q. And do you recall whether he had folks there, people to assist him, any employees or any one else who assisted him in [139] this business?

A. Not that I know of.

Q. You never knew of any? A. No.

Q. Were you quite closely familiar with the business?

(Testimony of Mrs. Bessie M. Tracy.)

A. Well, he made every trip from my home and came back to it. He might have hired a man for a day or two or might have had one or two, I don't recall that, over all these years, but he had no regular help, that I knew anything about or ever heard of.

Q. And you are quite definite in that testimony?

A. That's right.

Q. Where did the doctor and Mrs. Kelley live after he completed his internship in Rochester, do you recall?

A. They brought the baby and came to my house and he went immediately to a place called Sacketts Camp. It was some sort of training for the army. An army officer advised him to go ahead and do that, so that when war came he would already have a commission and they would allow him \$300 and expenses, and while he was gone my daughter and I found a location at Leonardsville through a doctor I had known for a long time.

Q. That is in the State of New York?

A. Yes, about, I imagine, about 10 or 12 miles out of Hamilton.

Q. Did they live in Leonardsville?

A. They lived there for a couple of years, maybe more, maybe less. [140]

Q. And moved somewhere else then?

A. To Clinton, New York.

Q. And did they live in Clinton? A. Yes.

Q. Were they living in Clinton at the time of the separation? A. Yes, they were.

(Testimony of Mrs. Bessie M. Tracy.)

Q. During the time that they were living in Leanardsville, did your daughter leave him for a time and return to your home with the boys?

A. No, she did not.

Q. That happened while they were in Clinton?

A. That happened while they were in Clinton.

Q. Did she return home at one time without bringing the boys home?

A. You mean for a definite stay at my home, without her children?

Q. Yes, a separation? A. Oh no.

Q. You are sure? A. Yes.

Mr. Avakian: That is all the questions of this witness, your Honor.

Mr. Brown: We have no further questions, your Honor.

The Court: Do either counsel for the government or the defendant wish this witness to be [141] retained further?

Mr. Avakian: So far as we are concerned, the witness will be excused.

Mr. Maxwell: May the government advise the witness later?

The Court: Very well, if you want the witness, you may advise.

(Jury admonished and recess taken at 4:45 p.m.)

Wednesday, March 28, 1956

10:00 a.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: At the conclusion of yesterday's session, Mrs. Tracy was the witness, and it is my understanding counsel would contact her. Is Mrs. Tracy still present?

Mr. Brown: We are going to request that the witness remain, your Honor.

Mr. Avakian: As far as the defense is concerned, we have no reason to hold her any further. The request is from the plaintiff.

The Court: During the course of the cross-examination, counsel for the defendant asked certain questions and the Court ruled against admission of that testimony. The Court will now rule that the defendant may cross-examine this witness on it.

Mr. Avakian: If the witness is going to be remaining for a time because the prosecution desires, could we confer for a moment and advise the Court later on whether we wish to cross-examine here?

The Court: Yes. We merely want the record to show that I granted that privilege. The government may proceed.

Mr. Maxwell: Your Honor, at this time I would like to have a piece of paper marked for identification.

The Court: The paper will be marked plaintiff's No. 58.

Mr. Maxwell: At this time the government would like to offer into evidence plaintiff's Exhibit 58 for identification.

Mr. Avakian: May I see it?

Mr. Maxwell: Yes, you certainly may, as soon as

I finish making the offer. I am permitted to identify the document.

The Court: Do that briefly.

Mr. Maxwell: Which appears to be a counter-affidavit, Motion for Allowances, etc., filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the matter of Wayne P. Kelley vs. Maxine L. Kelley, filed, it appears to be, March 13, 1946, and the signature of the defendant, Wayne P. Kelley, is attached on the third page. The document itself appears to be a photostat. It is a certified [143] copy.

Mr. Avakian: Your Honor, we are entitled to read it. Counsel could have shown this last evening and we would have looked it over, but I object to the statement that we are delaying.

The Court: Take all the time you want.

Mr. Avakian: We have no objection to this being received in evidence, your Honor.

The Court: The government's offer will be received in evidence as government's Exhibit 58.

Mr. Maxwell: At this time, may it please the Court, I would like to read Exhibit 58 to the jury.

The Court: You may.

Mr. Maxwell: (Reads Exhibit 58.)

"In the Second Judicial District Court of the State of Nevada in and for the County of Washoe

No. 97148 Dept. 2

Wayne P. Kelley, Plaintiff, vs. Maxine L. Kelley, Defendant.

Filed: Mar. 13, 4 p.m. '46. E. H. Beemer, Clerk;
A. L. Donati, Deputy.

Counter Affidavit of Motion for Allowances, etc.
State of Nevada,
County of Washoe—ss. [144]

“Wayne P. Kelley being first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has a good and sufficient defense upon the merits to his wife’s alleged cause of action for a decree of support maintenance and counter claim; that he has a good and sufficient cause of action against his wife for divorce, as more fully appears from his complaint on file herein, to which reference is hereby made;

“That he has read the affidavit of his wife Maxine L. Kelley, Defendant, and that he makes this counter affidavit for the purpose of showing to this honorable court why Defendant, Maxine L. Kelley, should not be allowed the sum of money asked for by her in her Motion for Allowances, and in support of said counter affidavit Plaintiff, Wayne P. Kelley, says:

“That a preliminary counsel fee of \$750.00 should not be allowed because Defendant is well able to pay her own counsel fees; that Affiant does not have the means to pay any counsel fee for Defendant; that although Affiant is a Doctor, Affiant has not practiced private medicine for a period of four years from date, that Affiant’s [145] only income for the past four years has been from his Army pay and that at no time during said past four years has Affiant’s pay exceeded the sum of \$250.00 per month; that during said four years and out of said Army pay Affiant has provided support for De-

fendant, Maxine L. Kelley and Affiant has also had to support his two children by a former marriage;

“That Affiant is now attempting to get back into the private practice of medicine and that it will cost Affiant at least \$5,000.00 to re-establish a practice in medicine, that although Affiant did sell a home in Clinton, New York for \$9,200.00, nevertheless, Affiant had to pay out indebtedness which included commission, mortgage indebtedness, back taxes, and repair bills, and the same amounted to about \$6,500.00;

“That as a result of said sale Plaintiff realized only about \$2,700.00, that Plaintiff has already had to expend more than the sum of \$2,700.00 and to obligate himself for another \$2,500.00 in order to buy equipment and to establish an office to practice his medicine and that Affiant has not yet commenced to practice his medicine;

“That Affiant acquired said home in New [146] York in 1935 and that Defendant, Maxine L. Kelley, never had any interest therein and never had any right to any of the proceeds from the sale of said home.

“That Affiant has seen at least four years of active service in the United States Army and that, at the present time, Affiant is suffering from battle fatigue and is undergoing a course of treatment to improve his physical condition to the point where he will be able to practice medicine in an efficient manner;

“That Affiant is informed and believes and for that reason says that Defendant, Maxine L. Kelley,

is and has been employed as a nurse in a hospital in New York and in such capacity is receiving upwards of \$200.00 a month.

“Plaintiff further says that Defendant’s request for \$500.00 for necessary traveling expenses, etc. should not be allowed because the travel fare from Utica, New York to Reno, Nevada and return, including Pullman charge, is actually \$220.50 and that said amount of \$500.00 is excessive over the amount that would actually be required by Defendant for the purpose of attending the trial in Reno, Nevada. Affiant further says that said allowances should not be [147] made to Defendant, Maxine L. Kelley, for the same reasons hereinbefore stated.

“Affiant says that the sum of \$150.00 for Defendant’s suit money, costs and depositions, should not be allowed for the same reasons hereinbefore stated and because Defendant requires only the sum of \$10.00 as suit money.

“Affiant says that the sum of \$200.00 per month alimony pendente lite should not be granted for the reasons hereinbefore stated and because Defendant, Maxine L. Kelley, is thirty years of age and of good health and is well and able to provide for her own support.

“Affiant further says in support of his statement that Maxine L. Kelley should not be granted any of these sums prayed for in her Motion for Allowances, Etc., that from March, 1942 until January, 1946, Maxine L. Kelley, received from Affiant, directly and indirectly, the sum of Five Thousand

Two Hundred Fifty-five Dollars and No Cents (\$5,255.00);

“That said sum of \$5,255.00 was received by said Maxine L. Kelley from Affiant in the following manner, to wit:

“That from March until May, 1942 said [148] Maxine L. Kelley received collections from Affiant’s accounts amounting to \$300.00 and retained said sum for her own use and benefit;

“That from May, 1942 until December, 1942 said Maxine L. Kelley resided with Affiant at Madison Barracks, New York and received her support and maintenance from and through Affiant and that during said period of time she received the sum of upwards of \$700.00 from Affiant;

“That from December, 1942 until February 17, 1943 said Maxine L. Kelley lived with Affiant at New Orleans, Louisiana and during said period of time received from Affiant the sum of \$555.00;

“That from February 17, 1943 to June, 1944 said Maxine L. Kelley received from Affiant the sum of \$2,250.00 at the rate of about \$150.00 per month during all of said period of time and that said Maxine L. Kelley further received the sum of at least \$1,000.00 as rent from the house owned by Affiant in Clinton, New York and retained said sums for her own use and benefit;

“That said Maxine L. Kelley during said period from February 17, 1943 to Jan. 1945 received United States Savings Bonds of a face value of \$450.00 from Affiant and has retained said Bonds [149] for her own use and benefit;

“Affiant further states that said Maxine L. Kelley has never been an employee of his while she was his wife and that he never owed her any compensation for any such employment.

“Affiant further states that said Maxine L. Kelley was never forced to seek employment but that she voluntarily sought employment.

“Further deponent saith not.”

/s/ WAYNE P. KELLEY,
Plaintiff and Affiant

“Subscribed to and sworn to before me this 13th day of March, 1946.

.....

Notary Public, Washoe County”

Mr. Maxwell: There is a signature but I can’t read it.

“My commission expires October 24, 1949.

“Service by copy of the foregoing counter affidavit admitted this 13th day of March, 1946.

.....

Attorney for Defendant.”

No signature for that.

“In the Second Judicial District Court of the State of Nevada in and for the County of Washoe
No. 97148 Dept. No. 2 [150]

Wayne P. Kelley, Plaintiff, vs. Maxine L. Kelley, Defendant.

“I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the fore-

going with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the "Counter Affidavit of Motion for Allowances, etc. and now on file and of record in my office.

"I do further certify that the same has not been altered, amended or set aside, but is still of full force and effect.

"In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 5th day of November, A. D. 1953.

[Seal] /s/ H. K. Brown,
County Clerk."

[151]

"I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that H. K. Brown, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

"That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

“And I further certify that said attestation is in due form of the law.

Witness my hand this 5th day of November, A. D. 1953.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.”

“State of Nevada,
County of Washoe—ss.

“I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of [152] Washoe, do hereby certify that the Honorable A. J. Maestretti, whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

“In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 5th day of November, A. D. 1953.

[Seal] /s/ H. K. BROWN,

County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.”

Mr. Maxwell: May it please the Court, I would like to have another piece of paper marked for identification.

The Court: It may be marked No. 59 for identification.

Mr. Maxwell: At this time I would like to offer

into evidence Plaintiff's Exhibit No. 59 for identification, which appears to be a quit-claim deed from Winfield O. Kelley and Cora R. Kelley to Lois K. and Wayne P. Kelley, has certification attached to it.

Mr. Avakian: The doctor showed it to us the other evening. We have no objection to its going in. [153]

The Court: Very well, the offer will be received in evidence as government's Exhibit No. 59.

LINO AIZZI

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please for the record? A. Lino Aizzi.

Q. Have you been sworn? A. Yes, I have.

Q. Where do you reside, Mr. Aizzi?

A. 1702 Alban Street, Reno, Nevada.

Q. What is your occupation, sir?

A. Banker.

Q. Can you be a little more specific?

A. Assistant cashier Nevada Bank of Commerce.

Q. I believe you have received a subpoena, asking you to bring down duplicate deposit slip? Is that correct, sir? A. Yes.

Q. And you have that slip?

A. I do. The original.

Q. And can you describe it for the record, exactly more or less what that is, in general terms?

(Testimony of Lino Aizzi.)

A. It is deposit made by George McKaig & Company on July 25, 1952.

Mr. Maxwell: I ask that the deposit slip, identified by the witness, be marked and offer it in evidence at this time. [154]

Mr. Avakian: We have no objection.

The Court: The offer will be received in evidence as government's Exhibit 60.

Q. I will show you government's Exhibit No. 60 and ask you to read the writing on the face thereof, if you will, please, sir, the pencil writing, just state what it is.

A. George M. McKaig & Company, 151 No. 5, July 25, 1952, currency 10,885, 94-2. First and Virginia Branch First National Bank.

Q. Does that indicate the check was deposited?

A. Was deposited.

Q. And what was the amount of the check?

A. \$14,118.25.

Q. Does it also show deposit of cash?

A. Yes.

Q. How much? A. \$10,885.

Q. I wonder if you could add those two amounts for us? Does the addition show on the deposit?

A. Yes, it does. Total \$25,003.25.

Q. Is there anything on the back of Exhibit 60?

A. Yes, there is.

Q. What is on the back of it?

A. It is notation made by the teller who received the deposit, the breakdown of the currency.

Q. What was the amount of currency?

(Testimony of Lino Aizzi.)

A. \$10,885.

Q. What does the writing on the back indicate in the way of currency?

A. One hundred denominations, \$5700; fifty denominations, \$300; twenty dollars denominations, \$3500; ten dollars denominations, \$1240; five dollars denominations, \$125.

Q. I wonder if you could tell us how many bills in each denomination there were in that currency?

A. Fifty-seven hundred dollar bills; six fifty dollar bills; 176 twenty dollar bills, 124 ten dollar bills, 25 five dollar bills.

Q. There must have been some one dollar bills and some change there too, is that right? What was the amount of the currency again?

A. \$10,885.

Mr. Maxwell: I have no further questions.

Mr. Lohse: We have no questions of the witness, your Honor.

(Witness excused.) [156]

Afternoon Session—March 29, 1956

1:30 p.m.

Defendant present with counsel. Presence of the jury stipulated.

Mr. Maxwell: Your Honor, at this time we would place into evidence a stipulation between counsel for the defendant and counsel for the government.

Now it is hereby stipulated by and between the parties in this proceeding, by their respective coun-

sel, for the purpose of this proceeding only, that if the duly qualified custodian of document relating to and including each of the items hereinafter set forth, were called as a witness, such witness would testify as related in each of the two following items: Item 1: That there was on deposit at the Oneida Valley National Bank, Hamilton Branch, account No. 6594, Hamilton, New York, standing in the name of Winfield O. and Phyllis I. Kelley, the following amounts on the following dates: December 31, 1948, \$3,933.98; December 31, 1949, \$3,973.42; Item 2: That there was on deposit with the City and County Savings Bank, Albany, New York, savings account No. 155522, standing in the name of Winfield O. Kelley, M. D. or Phyllis I. Kelley, the following amounts on the following dates: December 31, 1948; \$3509.32; December 31, 1949, \$3567.14.

The Court: Is that a signed stipulation?

Mr. Maxwell: No, your Honor, that is not. I believe counsel will agree that the stipulation has been made. [157]

Mr. Avakian: That is right.

The Court: I suggest it be put in evidence.

Mr. Avakian: We will stipulate. It will be stipulated at this time——

The Court: I think at such time as you have concluded all your stipulations, we should have all the stipulations in the record.

WINFIELD O. KELLEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(Testimony of Winfield O. Kelley.)

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, would you state your full name?

A. Winfield Kelley.

Q. And where do you live, sir?

A. I live in Norwich, Connecticut.

Q. You are a doctor of medicine?

A. That is right.

Q. Where did you receive your degree?

A. Johns Hopkins.

Q. What year? A. 1937.

Q. Doctor, I have subpoenaed you to appear here today, have I not? A. Yes.

Q. You are the defendant's brother? [158]

A. That is right.

Q. You are the defendant's younger brother, are you not? A. Yes.

Q. Doctor, who is Phyllis Dupuis?

A. That is my sister.

Q. What was her maiden name?

A. Phyllis Irene Kelley.

Q. Do you recall when she was married?

A. I can't give you the date, but I would say about a year ago, a little more than that.

Q. Did you and Dr. Kelley, Dr. Wayne Kelley, grow up together in the same home?

A. Yes, we did.

Q. Where was this?

A. We lived in the southern part of New York State on a farm, brought up on a farm, in Sheango Valley, near the village of Hamilton, New York.

(Testimony of Winfield O. Kelley.)

Q. Would you describe the farm, to the best of your recollection?

A. The farm was in the valley, a fertile valley. The farm was approximately 120 or 130 acres, a little over 100, tillable land. Later we had other property which had belonged previously to my grandfather.

Q. What did you raise?

A. General produce and cattle and hogs. [159]

Q. The years that you lived at home, to what years are you referring, to the best of your recollection?

A. My early life was not on the farm. We moved when I was about nine and from there on lived on the farm. My parents lived there in after life until my father died, but I was on the farm until I was through college and medical school.

Q. When did you start medical school?

A. In 1927. Because of my health I quit in 1929 and I was at home a few years after 1929 during my illness until 1935, then went back to medical school, 1935 to '37.

Q. You started medical school before your brother?

A. That is right, although he was older than I. Shall I continue?

Q. Go ahead.

A. He finished a year before I did. I was in college for two years, then went to medical school.

Q. Then the doctor started medical school about 1931, is that correct? A. No.

(Testimony of Winfield O. Kelley.)

Q. 1929, '30, '31? A. 1928.

Q. When did your father pass away, sir?

A. I don't know the exact date. Approximately six years ago.

Q. Did you share in his estate?

A. Well, the estate went to my mother. [160]

Q. Solely? A. She outlived him.

Q. Were you acquainted with the nature of his estate?

A. I would say it involved some savings, plus stocks and bonds, and the farm.

Q. Where was this will probated?

A. After my father's death?

Q. Yes. A. I don't know.

Q. Do you know why your mother took all the estate?

A. It was hers, as I understand. I think she just inherited it.

Q. Do you know what it was?

A. No, I honestly do not know.

Q. Now did you ever discuss with your father financial matters, such as your father's financial status during the years 1926 through 1933, '34, the depression years?

A. Actually very little was said about that. He was making a living on the farm and saving what he could. We didn't have discussions on financial matters.

Q. Now do I understand you to say that you and Dr. Wayne Kelley did not go to college together?

(Testimony of Winfield O. Kelley.)

A. No, I did not say that. We went to the same college, university in Hamilton, New York, but I started a year after he did and finished a year after he did. [161]

Q. What years were those?

A. For me 1923 to 1927; for him 1922 to 1926.

Q. Did you live at the college?

A. I lived at home most of the time.

Q. Did Dr. Wayne Kelley live at the college that you recall?

A. Well, he lived at home some of the time. We both lived part of the time in Hamilton.

Q. Do you know how the doctor paid his way through college, or did you know, first of all, if he——

A. I know I paid my way through when I worked at home and my folks helped me whatever it took to go to school.

Q. And did your parents help your brother, Wayne Kelley, go through college?

A. It was a matter of mutual—we helped on the farm.

Q. And they gave him money to buy his books and things of that nature in return? A. Yes.

Q. Now inviting your attention to the years the doctor went to medical school, were you living at home during any of that time?

A. For a short time, yes.

Q. Do you know how the doctor made his way through medical school financially? When I say the doctor, I am referring to your brother.

(Testimony of Winfield O. Kelley.)

A. Well, at least I can give you some idea.

Q. The best of your recollection. [162]

A. Some of the things he did. Of course, he worked on the farm, there was income from that. My brother decided to carry on a trucking business, not only for my father's products, but for neighbors around the surrounding towns, with his trucking business.

Q. Did your parents help him during that period of time in his trucking arrangements?

A. I don't know just how much they might have handed over to him in cash. I have never gone into those figures.

Q. Have you any idea at all? If you don't know, just say so. A. I do not know.

Q. Do you know if it was necessary for your brother to borrow money to complete his medical education?

A. Well, there was a little time—this goes back into family relationships—when after his marriage, when my folks disapproved of the marriage, there was a rift in the family. He was not favorably accepted. During that time I think it is possible he did borrow some money.

Q. You do not know how much or from where he could have borrowed it? A. No.

Q. Did you keep in touch with your brother after his graduation from medical school?

A. I kept in touch with him by occasional visits when I saw him at home sometimes, because you see during that time I was [163] in school, only home

(Testimony of Winfield O. Kelley.)

on visits. I was always in touch with my family.

Q. Do you have any knowledge of your brother's financial status subsequent to his graduation from medical school and prior to 1938?

A. Well, if you want me to give details, I honestly don't know, because I know he went to practice after post-graduate training, he went into practice.

Q. Did you ever try to borrow money from your brother? A. I don't believe I ever did.

Q. Did your brother ever try to borrow money from you? A. I don't believe he ever did.

Q. Do you know if, subsequent to his graduation from medical school, he borrowed money from any other persons?

A. I have no knowledge of that.

Q. As a matter of fact, isn't it a fact that your family did not contribute to Dr. Wayne Kelley's medical education?

Mr. Lohse: Your Honor, please, that appears to carry with it a tint of cross examination. This is the government's own witness and we object. Counsel is now cross examining his own witness.

The Court: I do not believe so, counsel. It might have been an unhappy expression of words.

A. Did my folks help him through medical school?

Q. Yes, did they help him? [164]

A. Well, I can't say that. I was ill most of that time and it is possible that they did not. I am not sure.

(Testimony of Winfield O. Kelley.)

Q. You do not know?

A. That is the answer.

Q. Very well. Now inviting your attention to the war years, Doctor, the years 1941 to 1945, where were you living during those years?

A. What years are those again?

Q. The war years, 1941 to 1945.

A. 1941 I was in Ann Arbor, Michigan, where I took some of my medical training, surgical, 1941 to 1943. 1943 to 1945 I was in Saranac Lake, New York, practicing.

Q. You were practicing thoracic surgery?

A. Yes.

Q. I ask you if during those years you had any control of any assets of your brother?

A. Referring—I don't remember the years now——

Q. I am referring to the war years now.

A. You are referring to the transfer of deed to property during that time?

Q. As a matter of fact, I am not, Doctor. I am referring to the years 1941, 1942, 1943, 1944, and 1945, stocks and bonds, real property, any other personal property that you may have had for him while he was away in the service.

A. That was before that time. I am not sure right now—my [165] sister and I had a bank account turned over to us. I am not sure whether it was before 1945.

Q. Now let us get back to 1941. First of all, do you recall when your brother was divorced the first

(Testimony of Winfield O. Kelley.)

time? A. I recall the occasion, yes.

Q. Do you recall what year?

A. Yes, when I was in Albany, during the summer of my post-graduate training—I am still guessing—it was probably after 1938 or 1939.

Q. Approximately? A. Yes.

Q. In 1938 and in 1939, 1940, those are the three years preceding the war—did Dr. Kelley, Wayne P. Kelley, at that time give you a cash box?

A. No, the only——

Q. Just answer.

A. The only box was at home.

Q. When you say home, what do you mean?

A. On the farm.

Q. Do you recall when the box was there?

A. I can't. It was during that time. I don't know exact.

Q. Did you ever see the contents of the box?

A. No, sir.

Q. Did you ever see the box itself?

A. Yes, sir. [166]

Q. Do you know how it got there?

A. I don't know. Anything could have happened when I was away. It is a long time ago.

Q. Do you know that the box belonged to Dr. Wayne Kelley?

A. I can't help but assuming it did, because he claimed it. It must have belonged to him.

Q. Under what were the circumstances that he claimed it as his own and at what time, if you recall? A. I don't know.

(Testimony of Winfield O. Kelley.)

Q. The cash box situation is quite vague?

Mr. Avakian: We object to counsel characterizing the testimony. The testimony speaks for itself.

Mr. Brown: That was a question.

Q. Doctor, perhaps if I let you examine some papers which are in evidence, it will help give some time sequence to some of these various things. I will ask you to examine Exhibit No. 30. You do not have to read it in detail, but familiarize yourself with it.

A. You do not want me to read every word of it?

Q. No. I want you to particularly look at the escrow instructions, the sheet on your left hand, and examine the signature at the bottom, has instructions by the buyer. See what you note there. Do you see your signature? A. Yes, sir.

Q. Will you read what it says? [167]

A. Above the signature?

Q. Yes, the signature, I think, is by someone else. Read it.

A. "The undersigned, designated as the seller, hereby agrees to convey the above described property to the buyer herein named, his or her heirs or assigns, upon the above terms and hereby releases the Washoe County Title Guaranty Company from all liability or the custody of said funds or any other matter in connection herewith, in the event the seller fails to comply with the terms of these instructions within the time limit hereinbefore men-

(Testimony of Winfield O. Kelley.)

tioned." Signed Winfield O. Kelley, by Lois K. Kelley.

Q. Does the date on that exhibit call to your mind a transaction, wherein you acted as straw man of the property purchased? A. Yes, sir.

Q. Would you explain, tell the Court and jury, how that came about?

A. At the time—it was during the time when he was having marital difficulties, that he wanted to have this property in somebody else's hands, so that it could not be attached by his former wife.

Q. Did you authorize the party who has signed the escrow instructions to sign them for you, or did you——

A. I certainly agreed to do this, I will say that much.

Q. So it was an agreement between you and your brother that was consummated by letters or by telephone calls that you made it? [168]

A. As I recall, it must have been by letter and telephone. I don't remember he ever made a trip East at that time to Albany where I was.

Q. Now did you contribute any money towards the purchase of that home?

A. No money changed hands.

Q. And you had no financial interest in the purchase of that home at all, is that correct?

A. No.

Q. I show you plaintiff's Exhibit 59 and I will ask you to examine that and see if you recognize that instrument?

(Testimony of Winfield O. Kelley.)

A. Yes, well, this is all in relation to the same thing. I do not remember this exactly. About this ten dollars——

Q. No, we are not concerned about the ten dollars. What we are concerned about is that your signature at the bottom and your wife? Do you recognize and can you recognize it?

A. This is printed. There is no signature here.

Q. That is right, excuse me. That is deed taken from the recorder's office. Do you remember executing such a deed? A. I will say I must have.

Q. You do not actually remember having done it yourself?

A. I am sorry. My memory isn't that good, that's all

Q. It is all right if you do not remember. That was in 1950, wasn't it?

A. I wouldn't say. [169]

Q. What is the date on the deed?

A. April, 1950.

Q. I note down at the bottom that there is the acknowledgment by a notary public, New Haven, Connecticut. A. That does recall.

Q. You recall going to the notary public and signing it?

A. I had a notary public right where I worked.

Q. Doctor, inviting your attention to the year 1948 and the year 1949, did you have any knowledge of a deposit with the Oneida Valley National Bank, Hamilton Branch, of an account standing in the name of Winfield O. and Phyllis I. Kelley?

(Testimony of Winfield O. Kelley.)

A. There was an account.

Q. Did you have a pass book or did you have any papers or documents relating to that account?

A. No. Again, as I recall, my sister was much closer than I was. It is quite likely that she, if anybody, had books, or would be the one to have it.

Q. Did you have any interest in the funds in that account? A. None.

Q. Do you know to whom those funds belonged?

A. They were transferred by my brother.

Q. How do you recall the transaction? How do you place it?

A. Again it was done generally through my sister. She was there and I was away in Connecticut, so nothing changed hands with me. [170]

Q. Do you know that the funds in there belonged to your brother?

A. Well, now I just have to assume they did.

Q. You claimed no interest in them at all?

A. No.

Q. Did you ever sign a deposit slip, to the best of your recollection? A. Yes.

Q. Do you remember how much was involved?

A. I do not believe I have that figure.

Q. Do you recall ever having that figure?

A. I may have had it at one time.

Q. Now I ask you if, during 1948 and 1949, you had on deposit with the City and County Savings Bank, Albany, New York, a savings account standing in the name of Winfield O. Kelley and Phyllis Irene Kelley, in the amount of \$3500?

(Testimony of Winfield O. Kelley.)

A. Yes, sir, I do recall that.

Q. Would you tell the Court and the jury the circumstances concerning your interest in that account?

A. The circumstances were the same as for the deed of the house. There was still the same problem of having my brother transfer property and funds so it could not be appropriated by his former wife.

Q. Do you recall how those transactions came about, whether by telephone conversation or by correspondence, or whether your [171] brother visited you?

A. I think he did by telephone and correspondence, not by visit.

Q. Do you know whether or not Phyllis had any interest in this money?

A. I would say she had no more interest in it than I did.

Q. And none of those funds were yours and you did not participate in them in any way?

A. That is right.

Q. And that refers to the other account too?

A. That is right.

Mr. Brown: You may inquire, gentlemen.

Cross Examination

Q. (By Mr. Avakian): Dr. Kelley, are you a practicing doctor at the present time?

A. Yes, sir.

Q. Will you state what your position is in Connecticut?

(Testimony of Winfield O. Kelley.)

A. My position is chief surgeon in thoracic surgery in the State of Connecticut, surgery of the chest.

Q. Employed by the city?

A. By the State, State Tuberculosis—thoracic relates to pulmonary tuberculosis, also other pulmonary conditions of the chest.

Q. With regard to these bank accounts that you have just been questioned about that stood in the names of yourself and your sister, Phyllis, do you recall what happened to those funds? [172]

A. Well, my brother wrote for them and had them transferred back to him finally.

Q. You have been questioned as to these accounts, with respect to the years 1948 and 1949, and I will advise you there has been a stipulation as to the exact amounts on deposit for those two years. Would you say it was approximately in 1950 that the funds were transferred back to your brother?

A. I can't say specifically to that.

Q. Can you fix it by reference to any other happenings or developments?

A. It must have been after his divorce. I am sure it was after his divorce.

Q. Let me ask you a question—when you refer to his marital difficulties, were you referring to his first wife? A. His first wife.

Q. The one he married in 1929? A. Yes.

Q. And I believe you testified that the divorce was after 1938 or '39?

(Testimony of Winfield O. Kelley.)

A. I don't know as I testified that. I don't know the year that the divorce was.

Q. But you do recall that he was divorced and that he had a second marriage?

A. That is right.

Q. And there was a divorce on that second marriage? [173] A. Right.

Q. Do you know his present wife, his third wife? A. Sure.

Q. What is her name? A. Lois.

Q. Do you recall approximately when that marriage occurred?

A. That occurred after the last war.

Q. Was it fairly closely related in time to the event of purchasing the house in your name in 1947? A. Yes, I believe so.

Q. When you refer to the difficulties with his former wife, in connection with these two bank accounts and in connection with the house, were you referring to difficulties with his first wife?

A. First wife.

Q. Were the funds of these two bank accounts transferred back to your brother Wayne after you understood that there had been a termination of his difficulties with his first wife?

A. Yes, I am sure, that is the way of connecting things up, I am sure after he settled the difficulties with his first wife.

Q. The quitclaim deed, Exhibit 59, a photostatic copy of it, which was shown to you, is dated April, 1950, and that is the date on which you transferred

(Testimony of Winfield O. Kelley.)

the title of the house back to your brother, is that correct? A. Yes. [174]

Q. And was it around that same time that the bank accounts were transferred back to your brother?

A. I would say about.

Q. That fixes it approximately?

A. Yes. I am sorry——

Q. Would you tell us what explanation your brother gave you in connection with the placing of the title to the house in your name and in connection with placing these two bank accounts in the names of yourself and your sister?

Mr. Brown: I object to that as no proper foundation. If we know the people present, where it took place and when, we will withdraw the objection.

Mr. Avakian: Your Honor, he has testified on direct examination that by telephone conversation and by letter he was given various items of information. That is what I am asking about. I simply ask for some specific statement, what was told him, of the particular thing which he testified to on direct examination.

The Court: Objection overruled.

A. I did know that my brother had considerable difficulties with his first marriage. It was an incompatible marriage and finally there was a divorce and after the divorce I know that she continued to cause much trouble in making some kind of a settlement. My brother was having a problem of

(Testimony of Winfield O. Kelley.)

saving himself and his property and in order to protect this property [175] he asked me to take over the house and these bank accounts.

Q. I believe you stated on direct examination he told you he wanted to prevent this all being attached by his first wife?

A. You know the legal expressions better than I do. I don't know what the legal term might have been, but I assume these actions terminated the case.

Q. I believe the word "judgment" is what you used.

A. I used the word but it may have been incorrect.

Q. I am not suggesting that. During your illness, which I believe you stated was from 1929 to 1935, except for your occasional visits home, were you pretty continuously at Saranac Lake?

A. Yes, I was there six years.

Q. Where is that located?

A. In the Adirondacks, northern New York. It is a fair trip from my home.

Q. Approximately how many miles?

A. It would be 160 miles.

Q. During that period, that six-year period, you testified that you occasionally saw your brother. Did you also see his wife during that period?

A. Yes.

Q. And you visited both of them?

A. Yes, I did, occasionally.

Q. Did you also communicate with them by

(Testimony of Winfield O. Kelley.)

mail? [176] A. Yes.

Q. You testified that your father passed away five or six years ago. Is your mother still living?

A. No, my mother died just recently, about six weeks ago.

Q. Where was she living at the time of her death? A. Norwich, Connecticut.

Q. Was she living in your home?

A. No, in a hospital.

Q. What had been her physical condition during the past few years?

A. She had been an invalid.

Q. Had this been a condition which developed progressively over a period of many years?

A. Yes, a gradual development.

Q. You mentioned, Dr. Kelley, that at the time of your brother's first marriage, at that time there was a rift in the family and the folks did not accept Wayne at the time because they objected to the marriage. Would you tell us more specifically what the situation was in that respect?

A. I know that at the time of the marriage, before the marriage, my parents, particularly my mother, was considerably opposed, never approved my brother associating with the girl. Afterwards she was still opposed and continued to be that way. She tried to relent and accept things, but it never worked.

Q. Is it a fair statement, then, that her opposition to this [177] marriage continued continuously, except for these periods of relenting? A. Yes.

(Testimony of Winfield O. Kelley.)

Q. You referred to what I believe Mr. Brown described as a cash box? A. Yes.

Q. Was this in the nature of a safe?

A. I suppose you would call it a safe, yes.

Q. In other words, it was a pretty good sized metal box? A. Yes.

Q. You say that Wayne claimed the box as his. You never saw the contents of it, is that right?

A. No, sir, I never did.

Q. Do you know whether or not Wayne had any of his possessions in that box?

A. Well, I know from his statements that he did have.

Q. These were his statements made at the time?

A. I don't know when they were made.

Q. I mean during this period?

A. At intervals I may have seen him on my visit home, something like that. I never knew the amount.

Q. You mean on your visits to the home of your folks? A. Yes.

Q. And that means back in this period prior to 1935? A. Yes. [178]

Q. You also mentioned, in response to questions on direct examination, something about the farming activities. I did not get your words on this, your voice did not carry through to me. You said something about the nature of the area in which this farm is located.

A. The farm was located in the Shenoyo Valley,

(Testimony of Winfield O. Kelley.)

which is a rather fertile and good valley. It was a fertile farm where we lived.

Q. You stated there were approximately 130 acres? A. Yes.

Q. And around 100 were tilled or cultivated?

A. Approximately 100 were fertile land.

Q. I believe you also spoke of some additional farm land. Would you give us some detail?

A. My grandparents, we took over their farm, my mother's family, so we had that farm. We used all these pieces for various activities on the farm, cattle raising and produce, other products.

Q. Produce, corn, or the general type of thing we go into in truck farming? A. Yes.

Q. What was your brother Wayne doing in connection with these farming activities, as best you can relate?

A. We were offered a living on the farm and I said already in addition to the usual work on the farm, my brother took on additional enterprise trucking produce to market. [179]

Mr. Maxwell: May we have this tied in by years?

Mr. Avakian: I will ask the witness to do the best he can.

A. Well, it was roughly between 1927 and 1930, I would say.

Q. And then you were gone for a period of about five years?

A. I was away after 1929 and he still did after I left. Of course, when I was away, I couldn't keep track of every activity. I knew he was doing the

(Testimony of Winfield O. Kelley.)

same thing, working hard, trucking, getting his products to market.

Q. To what markets were the products hauled?

A. New York City, mostly, I think.

Q. This business, then, involved the harvesting of crops and shipment to produce houses in the large metropolitan areas? A. Right.

Q. Can you tell us whether or not it was an important factor in the way that business profitable or not, whether the produce was shipped to arrive in a fresh condition?

A. Well, I can say it was profitable, yes. I am sure that my brother did quite well at it during the summer months. It was a good product.

Q. In addition, can you tell us whether or not the nature of that business was such that it was important, in order to make a good profit, to get the produce in the metropolitan markets as quickly as possible after picked? A. That is true. [180]

Q. And the condition of the produce would make a substantial difference?

A. Yes, would make a complete difference, such as peas picked and put in baskets and carried to the city must be fresh.

Q. Can you tell us what the performance of your brother Wayne was in that regard during the period you were at home, prior to 1930?

A. Well, his work was a combination of helping other farmers and getting baskets ready, acquainted with the farm industry, peas to be picked and put in baskets and shipped, getting stuff ready for mar-

(Testimony of Winfield O. Kelley.)

ket and shipped to market. He had a helper driving trucks also. One truck driver slept while the other drove, so there was no time lost.

Q. Do you know whether or not that speeded up shipment of products? A. Yes, it did.

Q. I believe you testified that there were some marital difficulties during the marriage of your brother to his first wife. During the period of that marriage, while they were living together, did you from time to time visit with the two of them?

A. Yes, I did.

Q. Did you have an opportunity then to observe personally the nature of their relationship with each other?

A. Yes. I should say perhaps that my visits were not long and it is quite likely they were on good behavior while I was there, [181] so I didn't see too much discord, but I knew and I also knew from reports from others.

Mr. Avakian: That's all.

Redirect Examination

Q. (By Mr. Brown): Doctor, you have testified on cross examination that Dr. Kelley's first wife continued to make trouble for him, as I understood, that she could appropriate his property, is that correct? A. That is my understanding, yes.

Q. Do you know how many children he had by his first wife? A. Yes, sir.

Q. How many? A. Two boys.

Q. Do you know what the doctor contributed to

(Testimony of Winfield O. Kelley.)

their support? A. No.

Q. Do you know what the doctor contributed to his first wife in the nature of alimony?

A. No, sir.

Q. Do you know what provisions he made for a division of any property he secured during their marriage? A. No.

Q. It is possible some of this discord could have arisen out of these various matters?

Mr. Lohse: Your Honor, please, I submit that is an improper question. [182]

The Court: Answer the question. He said is it possible.

Mr. Lohse: I move it be stricken——

The Court: Have you answered?

Mr. Brown: No.

The Court: Can you answer the question?

A. Would you state it again?

Q. I say, is it possible the marital discord, or rather these attempts to appropriate his property, could have arisen over conditions concerning these various factors?

Mr. Avakian: I do not understand whether the question refers to during the marriage or after the divorce or both?

The Court: I am going to ask you to reframe that question.

Mr. Brown: I will withdraw it entirely, your Honor.

Q. The produce business which you have described was pretty lucrative, was it not?

(Testimony of Winfield O. Kelley.)

A. Not having an oil well.

Q. Well, do you think it was worth ten thousand dollars a summer? Do you think your brother made that through the summer?

A. I would think probably not. I think that is a little excessive, but I don't know.

Q. How much did you make when you engaged in that business?

A. I didn't do that. I wasn't staying at home, and I had to leave when he was in most of it, from there on. [183]

Q. Do you think he could have saved one hundred thousand dollars during those three years, as a result of his activity?

A. I do not believe he could have, quite that much. I do not know the figures, however.

Q. This was during 1929, 1930, 1931 and 1932 now. How much money did you save when you worked on the farm during the summer?

A. I would say that our arrangements were completely different.

Q. How much money did you save?

A. I didn't have any money actually of my own. It all went into the family funds.

Q. You didn't get anything?

A. Of course, I got what I needed to go to school.

Q. Have you any idea what that amounted to? What did it cost to go to medical school a year in 1931, 1931 and 1932, a thousand dollars?

A. Oh, more than that.

(Testimony of Winfield O. Kelley.)

Q. Two thousand?

A. I would say over two thousand dollars.

Q. But you don't know whether he could have saved seventy-five thousand dollars during those three summers?

Mr. Avakian: Objected to as pure speculation. The witness has said he doesn't know—pure guess work.

The Court: As I understand the testimony, this witness has no idea at all what his brother made in [184] this business.

A. I can't give you any figures, I don't know.

Q. How do you know it was lucrative then?

A. Well, my brother told me he made money during those years.

Q. Did he tell you how much money he made?

A. No, he did not.

Q. When did he tell you?

A. During the times I was home. I know there was money. Of course he wouldn't be doing it if he couldn't make some money.

Q. How much money is relative?

A. I don't know.

Mr. Brown: That's all.

(Witness excused.)

Monday—April 2, 1956

Defendant present with counsel. Presence of the jury stipulated.

ANN DRISCOLL

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, will you state your full name?

A. Ann Driscoll.

Q. And where do you live?

A. 930 Novilly Drive, Reno.

Q. How long have you resided in Reno, to the best of your [185] recollection. A. Since 1928.

Q. You have been previously sworn in this matter, have you not? A. Yes.

Q. And you appear here this morning pursuant to a subpoena which I have caused to be issued, is that correct? A. Yes.

Q. Are you married? A. Yes.

Q. Your husband's name is William J. Driscoll?

A. Yes.

Q. You are employed? A. Yes, I am.

Q. What is your occupation?

A. I am with the American Automobile Association.

Q. I invite your attention to the years 1949 to 1952 inclusive, and I ask you if during that period of time you were employed by Dr. Wayne P. Kelley? A. Yes, 1949 and before, 1948.

Q. Now, with reference to the year 1949, will you tell the Court and the jury, very briefly, of what your duties consisted?

A. I was an assistant.

(Testimony of Ann Driscoll.)

Q. You mean an office assistant? A. Yes.

Q. Did you work in his office? [186]

A. Yes, I did.

Q. Where was his office at that time?

A. In the Masonic Building.

Q. In Reno? A. Yes.

Q. Did you keep the books?

A. No, I did not.

Q. Do you know who did keep the books?

A. I believe Mrs. Kelley.

Q. When you say you believe Mrs. Kelley kept the books, will you tell the Court and the jury on what you base your belief?

A. Well, she paid my salary, her signature was on the check, and we didn't keep books at all in the office. We collected money, I kept the record of the patients.

Q. Did Mrs. Kelley have anything to do with your withholding transactions with the State of Nevada or with the federal government?

A. She deducted our income tax from our check.

Q. Mrs. Driscoll, did you pay any of the doctor's bill? A. No, I did not.

Q. Did you write any of his checks?

A. No, I did not.

Q. Did you have a check book? A. No.

Q. Did you bill the patients? [187] A. Yes.

Q. What was the procedure used in billing the patients?

A. I would take the amount from the patient card and bill the patient.

(Testimony of Ann Driscoll.)

Q. Would you tell the Court and the jury what the patient card is? Would you describe one, please?

A. It is a file card, about so large, records the dates a patient calls and the amount paid.

Q. Did you keep an appointment book?

A. Yes.

Q. Were any amounts paid by the patients recorded in the appointment books?

A. I don't know.

Q. Did you keep a receipt book? A. Yes.

Q. Would you describe the receipt book please.

A. Well, the receipt book kept a carbon copy and we would write out the patient's name and amount paid.

Q. Was a duplicate kept in the receipt book?

A. Yes, sir.

Q. And do you know whether these receipt books were kept in the office, to the best of your recollection?

A. I believe they were until they were used up.

Q. And then do you know what happened to them? A. I turned them over to the doctor.

Q. Did you make up any deposit slips?

A. No, sir.

Q. Did you ever do any banking for the doctor?

A. No, sir.

Q. Did you have a cash box? Was it ever necessary to make change? A. Yes.

Q. How was that done?

A. I would get it from the doctor.

(Testimony of Ann Driscoll.)

Q. Do you know where the doctor got the change or made change? Did he have a cash box?

A. I don't remember whether he took it out of his pocket or whether he had a cash box.

Q. Did you ever receive cash from patients when they paid the bill?

A. Yes, checks and cash.

Q. What did you do with the cash?

A. Gave it to the doctor.

Q. Did you give a receipt for it?

A. Yes, I did.

Q. Did you make any entries on any books of any sort? A. Only on the patient card.

Q. Did the patients ever pay the doctor directly?

A. Yes, some did.

Q. Did you give a receipt? [189]

A. To some people, yes.

Q. Did you ever observe the doctor give a receipt? A. I can't say that. I don't remember.

Q. Did you always make a notation on a patient card every time you received a payment in cash or by check? A. Yes.

Q. What was the office procedure with reference to the incoming mail?

A. Well, if any mail looked like it was from a patient, I would open it and record the amount received through the mail. Any of the doctor's personal mail I did not open.

Q. Did you ever give receipts to patients when you received a check by mail?

A. Would you repeat that?

(Testimony of Ann Driscoll.)

Q. Did you ever mail receipts to patients when you had received a check by mail? A. No.

Q. Mrs. Driscoll, did you ever see patients in the office for whom there were no patient cards?

A. No, sir.

Q. Now, I again invite your attention to the appointment book and I ask you if you recall having seen any notations of amounts paid by patients not in the appointment book? A. No.

Q. I show you plaintiff's Exhibit 71 in evidence, and I ask you [190] if that is the type of receipt book or the type of receipt that you customarily issued?

A. It has been so long ago—it seems to me at the time I worked for the doctor he had receipts with his name on it.

Q. I show you plaintiff's Exhibit 61 and I ask you if that is the type you generally used?

A. Yes.

Q. I show you plaintiff's Exhibit 63 and I ask you if it was customary to use prescription slips as receipt forms? A. That I do not recall.

Q. I show you plaintiff's Exhibit No. 94 and I ask you if it was customary in the office to issue receipts of that nature?

A. No, I don't recall any like that.

Q. Mrs. Driscoll, did the doctor have an airplane while you were working for him?

A. Yes, sir.

Q. Did he ever discuss with you the use of his airplane? A. No.

(Testimony of Ann Driscoll.)

Q. Did he ever say for what he used the airplane? A. He enjoyed his airplane.

Q. Did he indicate, or did you have any indication while you were working for him, whether or not he used his airplane in connection with the practice of medicine? A. No.

Q. You have no recollection of that whatsoever?

A. No.

Mr. Brown: You may inquire.

Cross Examination

Q. (By Mr. Lohse): Mrs. Driscoll, with reference to any discussions you might have had with the doctor concerning the use of his airplane, isn't it a fact, at the time you worked there, he did use that airplane to attend medical meetings, is that not true?

A. Well, I can't remember. I really don't remember his saying; he may have.

Q. Did the doctor ever take a trip in the airplane during the year that you worked for him?

A. I have a very poor memory, I am sorry, and I can't recall. He may have taken a trip, but I am sorry, I just can't say whether he did or not.

The Court: That is perfectly all right. If you can't recall, that is your answer.

Q. Mrs. Driscoll, while you served the doctor as his assistant, do you recall he had as patients pilots for physical examinations? A. He may have.

Q. Do you recall any specific patients?

A. No.

(Testimony of Ann Driscoll.)

Q. Inviting your attention again, Mrs. Driscoll, to the year 1949, I believe you stated to Mr. Brown on his direct examination that the doctor kept a date book or date calendar in his [192] office for appointments?

Mr. Brown: I think she testified she kept it.

A. I had one on my desk.

Q. Do you know, Mrs. Driscoll, whether the doctor had one in addition to the one that you kept?

A. I believe he kept a record, too.

Q. During that period of time was it your practice to enter the names of the patients in the date book as they appeared in the office? A. Yes.

Q. Isn't it a fact, Mrs. Driscoll, that you likewise made entries of payments from patients in that date book?

A. No, not in the book, on the file card, the patient card.

Q. Isn't it your testimony that the doctor did not keep a date calendar on his desk at the time you had one?

Mr. Brown: She testified the doctor did keep a calendar. I believe you are misquoting her testimony.

Mr. Lohse: I don't want to misquote. I was confused; can you explain?

A. As I recall, the doctor did keep a record and date book on his desk.

Q. Did you ever have any occasion, actually, to observe such a record?

A. I may have, I can't recall.

(Testimony of Ann Driscoll.)

Q. Do you not know whether he actually made any entries on [193] such record in his office?

A. No. At the time I was there I can't recall.

Q. I believe, Mrs. Driscoll, you testified on direct examination that whatever payments you received in currency you would issue receipts for, during the time you worked in the doctor's office?

A. Yes.

Q. You are certain of that? A. Yes.

(Witness excused.)

MARGUERITE McKNIGHT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, what is your full name?

A. Marguerite McKnight.

Q. You were sworn here this morning, were you not? A. Yes.

Q. You appear here because you were subpoenaed, isn't that correct? A. That's right.

Q. Miss McKnight, where do you live?

A. On Arlington Avenue, Reno.

Q. And you have lived in Reno for some years last past? A. Twenty-eight years.

Q. Are you married? [194]

A. No.

Q. Are you employed? A. Yes.

Q. What is your occupation?

(Testimony of Marguerite McKnight.)

A. General office work, insurance.

Q. Where?

A. McDow and Showalter Insurance.

Q. Inviting your attention to the year 1949 to the year 1952 inclusive, I ask you if during that time you were employed by Dr. Kelley?

A. Yes, I was.

Q. Do you recall the years?

A. May 1949, 1950 and into 1951.

Q. Could you tell the Court and the jury, very briefly, of what your duties consisted?

A. Yes, general office nursing.

Q. Did you keep any books?

A. No, I kept no books.

Q. From whom did you receive your pay check?

A. From Dr. Kelley.

Q. Was it always signed by Dr. Kelley?

A. I don't quite recall whether sometimes Dr. Kelley's signature or Mrs. Kelley's.

Q. Who prepared the withholding statements?

A. I presume they were done outside the office.

Q. They were not done by you? A. No.

Q. Did you pay any office bills, write any office checks? A. No, I paid nothing.

Q. Did you have an office check book?

A. No.

Q. Did you bill the patients?

A. Yes, there were monthly statements sent out by me.

Q. Will you tell the Court and the jury what your procedure was in billing the patients?

(Testimony of Marguerite McKnight.)

A. They were billed from running balances presented on their card, history card.

Q. Would describe the history card? Tell us what a history card is.

A. Yes, a history card is kept by most doctor's offices, with their patient's name, their complaint, their ailments, and a running down probably of their account on the reverse side.

Q. They are sometimes referred to as patient cards? A. Yes, I believe so.

Q. Did you keep an appointment book?

A. Yes, we had a daily appointment book.

Q. Did you ever record any amounts paid by the patients in your appointment book?

A. No, not in the appointment book.

Q. Did the doctor keep an appointment book?

A. Yes.

Q. Did you ever have occasion to observe or examine that appointment book?

A. I frequently made notations in the appointment book.

Q. Do you recall ever having observed notations of patients' payments being made in the doctor's appointment book?

A. No, I do not recall notations of that kind.

Q. Did you make up any deposit slips or do any banking for the doctor?

A. No, I handled no money.

Q. What was the procedure when a patient paid you?

A. When a patient crossed from the outer office

(Testimony of Marguerite McKnight.)

desk, he was given a receipt for it and that money was immediately given to Dr. Kelley.

Q. You didn't have a cash box? A. No.

Q. Suppose the patient paid you by check, what did you do?

A. That was likewise recorded and given to Dr. Kelley.

Q. You didn't hold the cash and didn't hold the checks at all? A. No.

Q. Did you ever observe patients paying Dr. Kelley?

A. Yes, at times as I would go through the inner office, they would be paying the Doctor.

Q. Did you ever on those occasions, and at the doctor's direction, give them a receipt? [197]

A. Yes.

Q. Did you testify that you kept a receipt book? Did I ask you that question? A. Yes.

Q. Do you recall what happened to it—first of all, can you give us an estimate of how long a receipt book lasted?

A. I don't recall if the size of them was 100 or 500, might be smaller.

Q. You used several in the course of your employment? A. Oh yes.

Q. Now I ask you if you always made a notation on the patient cards when you received payment by cash or by check?

A. Well, those notations were made from the receipt book, it is possible at the time of payment.

(Testimony of Marguerite McKnight.)

Frequently there wasn't time at that moment to record on the card.

Q. But to the best of your recollection was it always done? A. Yes.

Q. What was your procedure when you received checks by mail?

A. Those that crossed my desk were receipted and a notation made on the patient's card.

Q. Now with reference to the patient cards, was there one large file or was it several files, or can you tell the jury and the Court how they were set up?

A. As I recall, there were two drawers of cards, the active drawer and another drawer of cards, inactive patients that [198] weren't coming in regularly or paid-up patients. When the cards were cleared, they were kept in that file.

Q. They were not current patients, is that correct?

A. No, there were two cards, one for current patients and one for inactive.

Q. Then when a patient was paid up, but he was still active, was he in one drawer, is that what I understood you to say?

A. Well, as I recall, the active cards were in one drawer and the patient that wasn't coming regularly was kept in the inactive file, usually was paid up.

Q. Do you know whether or not the doctor kept an airplane?

A. Yes, at the time I was with Dr. Kelley he had an airplane.

(Testimony of Marguerite McKnight.)

Q. Did you ever have any conversations with the doctor concerning the use of his airplane in connection with his practice?

A. No, I didn't know that he used it for his practice.

Q. Did he ever remark what he used it for?

A. Well, it was quite enjoyable.

Q. Do you recall whether or not the doctor used it for the purpose of any medical conventions, while you were employed?

A. Yes, while I was with Dr. Kelley he used it to fly to two or three conventions, I believe.

Q. Do you recall whether he ever flew on trips other than to medical conventions?

A. Pleasure trips over week-ends.

Q. Do you recall if he ever took a trip to Alaska? [199]

A. Yes, he took a short trip to Alaska.

Q. Do you know if that was in connection with his practice?

A. I presumed it was just a vacation trip.

Q. Do you know whether or not the doctor treated, or whether he had as patients, Civil Aeronautics pilots?

A. No, I don't.

Mr. Brown: You may inquire.

(Jury admonished and morning recess taken at 11:00 o'clock.)

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

MISS McKNIGHT

resumed the witness stand on

Cross Examination

Q. (By Mr. Lohse): Miss McKnight, I believe Mr. Brown asked you whether or not you recall the doctor examined any patients for the Civil Aeronautics Authority and I believe your answer was that you could not recall, is that correct?

A. I don't recall; he may have.

Q. I understand there has been a long lapse of time, Miss McKnight. Now let me ask you this perhaps to refresh your recollection, isn't it a fact, Miss McKnight, at least on some occasions during the time you served Dr. Kelley, you filled out forms requiring to be sent to the Civil Aeronautics Authority after the doctor had examined patients?

A. Yes, it is.

Q. Do you remember any specific patients for whom that was done?

A. I don't recall.

Q. Do you recall, Miss McKnight, ever sending in forms from the doctor's office to the Civil Aeronautics Authority?

A. Yes, their office did.

Q. Were there many instances, Miss McKnight, during the time you served the doctor, that you made out forms for use for governmental agencies on patients?

A. We made out Industrial forms.

Q. Did you make those out and send them in, is that correct?

A. Yes.

Q. And that doesn't refresh your recollection in

(Testimony of Marguerite McKnight.)

connection with the CAA? A. It is possible.

Q. It is possible, but you do not actually remember filling out any, but it is possible, is that right?

A. Oh sure.

Mr. Lohse: I think that is all.

Mr. Brown: That is all.

(Witness excused.)

HELEN L. HILL

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [201]

Direct Examination

Q. (By Mr. Brown): State your full name please? A. Helen L. Hill.

Q. You were heretofore sworn this morning?

A. Yes.

Q. You appear here pursuant to subpoena which was issued by me, do you not? A. Yes.

Q. Where do you live, Mrs. Hill?

A. 850 Brentwood Drive.

Q. Reno? A. Yes.

Q. You have lived in Nevada for some years last past? A. Yes.

Q. What is your occupation?

A. Medical secretary.

Q. Calling your attention to the years 1949 to 1952 inclusive, were you employed by Dr. Kelley during those years? A. Yes.

Q. Do you recall specifically in what years?

A. 1951.

(Testimony of Helen L. Hill.)

Q. Tell the Court and jury, very briefly, of what your duties consisted.

A. My duties consisted of medical assistant, helping with the office and answering the telephone.

Q. Did you keep any books? A. No, sir.

Q. How did you receive your pay check?

A. It was brought to me.

Q. By whom? A. By Dr. Kelley.

Q. How was the check signed?

A. I don't recall; I believe it was Dr. Kelley.

Q. Do you ever recall having received any checks signed by Mrs. Kelley?

A. I do not remember.

Q. Did you write any office checks? A. No.

Q. Did you pay any office bills? A. No.

Q. Did you receive any office bills?

A. They might have come in the mail.

Q. Did you bill patients? A. Yes.

Q. Would you tell the Court what that procedure was?

A. The usual monthly statements that you send out at the end of the month.

Q. Where did you get your information?

A. From the patient card filed.

Q. What is a patient card? [203]

A. Well, a card about like this, has the history on it and charges made to the patient.

Q. Were they kept by you? A. Yes.

Q. Did you keep an appointment book?

A. Yes.

Q. Did the doctor keep an appointment book?

(Testimony of Helen L. Hill.)

A. I really believe he had an appointment book, but I can't say for sure.

Q. Did you ever make any notations in your appointment book of amounts paid by patients?

A. No.

Q. You are not sure about the doctor's appointment book, you don't know whether or not he made any notation of payments by patients in it, do you?

A. No.

Q. You kept a receipt book, did you not?

A. Yes.

Q. Did you issue a receipt for all amounts that came across to you, checks? A. Yes.

Q. Did you have a cash box? A. Yes.

Q. Where was the cash box kept?

A. In the desk drawer. [204]

Q. What would you do with your accumulated cash at the end of the day?

A. Took it to Dr. Kelley.

Q. Did you make deposit slips? A. No.

Q. Did you ever do any banking? A. No.

Q. Did you ever observe payments made to the doctor directly? A. I don't recall.

Q. Do you recall how often you would use up a receipt book? A. No.

Q. If you have a file of used receipt books in the office? A. No, not that I can recall.

Q. Did you ever receive checks by mail?

A. Yes.

Q. Do you recall who opened the mail?

A. I did.

(Testimony of Helen L. Hill.)

Q. Always? A. I can't say for sure there.

Q. You don't remember? A. No.

Q. Now when you received a check by mail, did you issue a receipt? A. I don't recall.

Q. Did you ever see any patients for whom there was no patient card? [205]

A. No, I never did.

Q. Do you know whether or not the doctor had an airplane? A. He said he did.

Q. Do you know if he used his airplane in connection with the practice of medicine? A. No.

Q. Do you know whether he used his airplane for purposes of his own personal pleasure?

A. I believe he did.

Q. Upon what do you base your opinion?

A. His saying that he liked to fly.

Q. Can you recall any time that he used his airplane in connection with his practice? Did he have patients in other cities and other states?

A. Not that I know of.

Q. Do you recall whether the doctor attended medical conventions during the time you were employed by him in his airplane? A. Yes.

Q. Do you recall where he went?

A. I believe he went to Atlantic City.

Mr. Brown: You may cross examine.

Cross Examination

Q. (By Mr. Avakian): Mrs. Hill, I take it you worked for Dr. Kelley only a short period of time, is that right? [206] A. Yes.

(Testimony of Helen L. Hill.)

Q. Is that because you preferred to take a job where you could work part time instead of full time? A. Yes.

Q. And the work at Dr. Kelley's required full time? A. Yes.

Q. Can you tell us, Miss Hill, during the time you were working there, whether there was a rather heavy load of detail work? A. Yes.

Q. Did this mean quite frequently the making of entries as to receipt of money had to be delayed until some time after the money had actually been received, until you could get a breathing spell?

A. Yes.

Q. Do you recall that Dr. Kelley went to the medical convention in Atlantic City in his own airplane? A. He said he did.

Q. You recall he went to the convention?

A. Yes.

Q. Do you recall, Mrs. Hill, during the period you were there, Dr. Kelley from time to time had patients who were pilots? A. Yes.

Q. Do you remember whether or not he conducted physical examinations of pilots for the Civil Aeronautics Authority? [207] A. Yes.

Q. And that required filling out some forms to be filed with the CCA? A. Yes.

Q. Did you assist in the preparation of those forms? A. I did.

Q. Can you tell us, as best you can after all these years, what type of information you, as office assistant, entered on those forms?

(Testimony of Helen L. Hill.)

A. The name and address—I really don't know.

Q. Do you know whether or not you took down preliminary information as to the patient's age and weight?

A. I do not recall. I believe I checked the name and address; I do not recall.

Q. Do you recall whether, after the examination, you did any typing on any of these forms?

A. No.

Q. Do you recall whether or not you mailed anything in to the CAA? A. I do not recall.

Q. But you do remember that these forms were filled out for some of these CAA patients?

A. Yes.

Mr. Avakian: That is all. [208]

Redirect Examination

Q. (By Mr. Brown): Do you recall how often the doctor, in his practice, saw an aviator?

A. No.

Q. Do you remember how many came into the office? A. No.

Q. Do you recall if one came in every day?

A. No, he didn't.

Q. Can you give us your best estimate of how often he saw an aviator? A. I don't know.

Mr. Brown: That's all.

(Witness excused.)

ESTHER S. VILLARS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(Testimony of Esther S. Villars.)

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Esther S. Villars.

Q. Where do you reside, Mrs. Villars?

A. Reno.

Q. What is your occupation?

A. Office work.

Q. Were you ever employed by Dr. Wayne P. Kelley? A. Yes.

Q. Can you recall when you were employed?

A. August 15th to March 20, 1951 and 1952.

Q. Mrs. Villars, what did you do for the doctor during that time? What was your general work?

A. General office work, assisting the doctor.

Q. Did you keep any books for the doctor?

A. No.

Q. Did you have anything to do with the payments that were made by the patients?

A. Yes.

Q. What would you do?

A. I receipted for them.

Q. Did you make the receipts at all times?

A. Not at all times.

Q. Who else made the receipts, if you know?

A. The doctor.

Q. What would you do with the money after you received it and issued a receipt to the patient?

A. Put it in the cash box.

Q. You had a cash box then? A. Yes.

Q. What would you do with the amounts in the cash box at the end of the day?

(Testimony of Esther S. Villars.)

A. Give it to the doctor.

Q. Did you make all entries on the patient card for payments that came across to your desk? [210]

A. Yes.

Q. Did you make any entries on patient cards for payments that were given to the doctor, if there were any?

A. I don't remember.

Q. Do you recall whether receipts were issued in all cases?

A. No, I don't.

Q. Mrs. Villars, do you have any idea whether most payments were made there by currency or check by the patients?

A. I wouldn't know.

Q. Do you know whether currency exceeded those of checks, or you don't know?

A. No.

Q. Now did you keep the files of patient cards, Mrs. Villars?

A. Yes.

Q. How many files did you have?

A. Two.

Q. And what was in each one of those two files?

A. One was current unpaid and the other was paid.

Q. Were all of the patient cards in your files?

A. No.

Q. Where were the others, if you know?

A. Well, some of them were in the doctor's drawer, top desk.

Q. Dr. Kelley would keep some of the patient cards in his top desk drawer?

A. Yes. [211]

Q. Did you ever have a patient give you a payment that you could not find a patient card?

A. I do not know.

(Testimony of Esther S. Villars.)

Q. Did you ever have occasion to ask Dr. Kelley for any patient cards he kept in his desk?

A. Yes.

Q. What was the purpose of that?

A. To apply payments.

Q. Would he give you those? A. Yes.

Q. What did you do with the card after you had made the application? A. Put it back.

Q. Now, Mrs. Villars, did Dr. Kelley have an airplane? A. Yes.

Q. Do you know what he used that airplane for?

A. No.

Q. Did he use it for business?

A. Well, I don't know. He went to conventions with it.

Q. Did he ever use it for vacation trips?

A. One that I know of.

Q. What was that? A. Hunting.

Q. Do you know whether or not he flew every morning?

A. I don't know if he flew every morning, but he did fly [212] some mornings.

Q. Was that for pleasure or for business?

A. I don't know.

Q. Did he ever have any patients early in the morning when he flew his airplane?

A. Not that I knew.

Mr. Brown: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mrs. Villars, with re-

(Testimony of Esther S. Villars.)

gard to these patient cards that were kept in Dr. Kelley's desk, you say that at times you asked for those patient cards so you could record a receipt of money on it? A. Yes.

Q. And then you put the card back, is that right? A. Yes.

Q. Did these represent patients who were coming in frequently? A. I don't know.

Q. Well, they were cards at least on which you received money at the time? A. Yes.

Q. Does that refresh your recollection, if you were receiving payments that these in general were patients that came in regularly to see the doctor?

A. No, I don't think so. It is rather difficult to recall this long. [213]

Q. Did the doctor have patients who, at times, came in regularly for a number of days close together, for a course of treatment? A. Yes.

Q. With regard to the airplane, Mrs. Villars, do you recall that Dr. Kelley from time to time had patients who were pilots? A. Yes.

Q. And do you recall that from time to time he conducted physical examinations for pilots, in connection with their CCA examination?

A. Yes.

Q. And did that involve the filling out of forms for the CAA? A. Yes.

Q. Did you, yourself, assist in the preparation of those forms? A. Yes.

Q. And after the completion of the examination, did you at times mail those forms yourself?

(Testimony of Esther S. Villars.)

A. That I don't recall.

Mr. Avakian: I think that is all.

(Witness excused.)

Afternoon Session—April 2, 1956. 1:30 P.M.

Defendant present with counsel. Presence of the jury stipulated.

MRS. PHYLLIS DUPUIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Phyllis Dupuis.

Q. Where do you reside, Mrs. Dupuis?

A. Philadelphia.

Q. What was your maiden name?

A. Phyllis Irene Kelley.

Q. Do you bear any relation to the defendant?

A. Yes.

Q. What? A. Sister.

Q. Mrs. Dupuis, was the Hubbardsville, New York farm owned by your parents? A. Yes.

Q. Did you reside there? A. Yes.

Q. Do you know whether or not that property is still in the possession of your parents?

A. No, it is sold.

Q. When was it sold? [215]

A. In '51 or '52.

Q. '51 or '52—how much was it sold for?

(Testimony of Mrs. Phyllis Dupuis.)

A. Twelve thousand.

Q. Do you know what happened to the proceeds of the sale of the farm? A. Yes.

Q. What was that?

A. My mother was the only one left.

Q. And she received the proceeds?

A. She received the proceeds.

Q. Now do you recall whether or not there was in existence a farm owned by her parents or family? A. Yes, her parents.

Q. Do you recall when that was sold by the family?

A. I can't recall the exact date.

Q. Approximately?

A. Approximately 1930.

Q. Now, Mrs. Dupuis, I will show you government's Exhibit 15. Government's Exhibit 15 consists of two bank account signature cards, the top one has "temp" (temporary) at the top of it. I will ask you to look at that signature on that card and I will ask you if that is your signature?

A. That is my name.

Q. I realize that is your name. Did you write that? A. No. [216]

Q. Now will you look at the top card and I will ask you if that top card contains your signature? A. Yes.

Q. Where were you when you signed that?

A. In Philadelphia.

Q. What date does it bear?

A. May 5, 1948.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Now I will show you plaintiff's Exhibit 14, together with No. 15. No. 14 is a ledger account in the name of Phyllis Irene Kelley, Hubbardsville. The account is in the Security First National Bank of Reno, Reno, Nevada. I will ask you if any of the funds in that account belonged to you?

A. No.

Q. Do you know to whom they belonged?

A. My brother.

Q. Did he tell you he was opening an account for you in the Reno Security National Bank?

A. No.

Q. Did he tell you he was putting the account in your name? A. Yes.

Q. Now I will show you government's Exhibit 16, deposit slips. I will ask you what deposit slips, if any of them, were made by you? A. No.

Q. Now, Mrs. Dupuis, I have here a Security National Bank of [217] Reno, Nevada, savings withdrawal ticket, dated July 14, 1950, and a check drawn on Phyllis I. Kelley in the sum of \$8896.21, dated July 14, 1950, cashier check on the Security National Bank, plaintiff's Exhibit No. 18, and I will ask you first to refer to the savings withdrawal ticket, and I will ask you if the signature on that ticket is in your handwriting? A. No.

Q. Did you write in the amount up here, \$8896.21? A. No.

Q. Do you recognize that handwriting?

A. My brother's.

Q. Which brother is that? A. Wayne.

(Testimony of Mrs. Phyllis Dupuis.)

Q. You also have a brother by the name of Winfield? A. Yes.

Q. Now I will show you cashier's check. I would like to know if that is your endorsement on the back of that check? A. Yes.

Q. Did you put the words on there, "Pay to the order of Wayne P. Kelley" in typewriting above your signature? A. No.

Q. Do you know who did? A. My brother.

Q. Do you recognize his signature underneath your signature? A. Yes. [218]

Q. Now do you recall where you were on July 11, 1950?

A. I believe I was at home, Hubbardsville.

Q. Do you know how you got that check to endorse it? A. By my brother.

Q. And did you return it to your brother after you had endorsed it? A. Yes.

The Court: I take it when the expression "my brother" is used, unless stated to the contrary, you are referring to Dr. Wayne Kelley?

A. Yes.

Q. Now, Mrs. Dupuis, it has been stipulated into evidence in this case the existence of balances in several savings accounts in New York State banks. These accounts were in your name and in the name of your brother, Winfield O. Kelley. Do you know the accounts to which I have reference?

A. Yes.

Q. Were the funds in those accounts your funds? A. No.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Do you know whose funds they were?

A. Well, Wayne's.

Q. Did you ever have a pass book for those accounts? A. No.

Q. Did your brother ask you to have those accounts in your name? [219] A. No.

Q. Do you recall the approximate date of the first savings account taken out in your name or the name of your brother, Winfield O. Kelley, by Dr. Wayne P. Kelley? A. I don't recall the date.

Q. Would it have been during the time he was in the service? A. No.

Q. Was it subsequent to the time he was in the service? A. Yes.

Q. It would be subsequent to 1946?

A. Yes.

Q. Now did you ever have custody of an amount of currency other than those savings accounts belonging to your brother, Wayne P. Kelley?

A. No.

Q. Did you ever see any currency, other than these savings accounts, which belonged to your brother, Wayne P. Kelley? A. No.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Lohse): Mrs. Dupuis, were you born in Hubbardsville, New York? A. Yes.

Q. And if you don't mind stating, what was the year of your birth? A. 1918. [220]

Q. And how much younger would you be than

(Testimony of Mrs. Phyllis Dupuis.)

Dr. Wayne Kelley? A. Thirteen years.

Q. Where did you receive your education?

Mr. Maxwell: May it please the Court, I do not think this has any reference to the direct examination and if counsel desires to make this his witness, that is satisfactory at the proper time. It is all immaterial in the first place.

The Court: The Court will permit it.

Q. Mrs. Dupuis, in response to question asked by Mr. Maxwell, I believe you stated your parents owned the farm, it was sold in about 1951?

A. Yes.

Q. And if you know, about how much in acreage did that farm consist of?

A. One hundred thirty acres.

Q. Do you know whether the entire 130 acres was tillable?

A. About 100 acres was tillable.

Q. Did your mother, after your father's death, undertake to cultivate that property, prior to the sale? A. Yes.

Q. Did she operate that farm herself for any length of time after his death?

A. Up until it was sold.

Q. When did your mother pass away?

A. February this year. [221]

Q. You testified, in connection with questions Mr. Maxwell asked you in regard to Exhibits 14, 15, and 16, signature cards on bank account in the Security National Bank of Reno, Nevada, that one of them contained your signature, did it not?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes.

Q. And the other your name, but you had not signed that card? A. Yes.

Q. At the time, Mrs. Dupuis, that you signed that card, had you had any discussions with your brother Wayne, concerning the request which he made—any explanation from him of the reasons why he asked you to do so?

A. I have a letter.

Q. In substance do you recall the nature of the communication?

Mr. Maxwell: Your Honor, I do not believe any proper foundation has been laid in the first instance; in the second instance, it sounds to me a great deal like this is going to be a self-serving statement.

Mr. Lohse: I think Mr. Maxwell on direct asked Mrs. Dupuis whether or not she had been requested to do so and I am only now trying to determine in what manner that came about.

The Court: You may proceed.

A. By letter my brother sent the card.

Q. At the time he made that request, Mrs. Dupuis, did he state any reason for making that request to you?

Mr. Maxwell: Your Honor, before the letter is read, I [222] would object to it. I would say no proper foundation has been laid for this witness's testimony. The testimony is not the best evidence as it stands now.

Mr. Lohse: I submit, your Honor, Mr. Maxwell

(Testimony of Mrs. Phyllis Dupuis.)

asked that type of information and it went in without objections.

Mr. Maxwell: I merely asked her if her brother had so requested her to sign it. I think that is satisfactory. That does not go into the manner of the request.

The Court: Objection overruled.

Q. Will you then state, please, Mrs. Dupuis, what request or explanation you received from Wayne Kelley for your signature on that card?

A. He wrote me a letter, asking that I sign the card.

Q. Nothing further?

A. The fact that his first wife, he was still having difficulty.

Q. With respect to the accounts which were established in the New York banks, you were asked questions by Mr. Maxwell particularly whether or not any income deposited in the bank accounts standing in your name and your brother Winfield's name were your funds and you said no, is that correct? A. Yes.

Q. In establishing of those funds, Mrs. Dupuis, did your brother, Wayne Kelley, make any request of you? A. Not any than before.

Q. And what were made? [223]

A. What I just mentioned.

Q. The same request in connection with the bank accounts in New York? A. Yes.

Q. And was that the reason why you permitted your name to be used to the bank accounts in New

(Testimony of Mrs. Phyllis Dupuis.)

York and Nevada? A. That is correct.

Mr. Lohse: Your Honor, I have nothing further to offer on cross examination at this time. I would like, with the Court's permission, to approach the bench.

(Conference at bench between Court and counsel.)

Redirect Examination

Q. (By Mr. Maxwell): Mrs. Dupuis, as I recall your testimony on cross examination, you stated that your brother sent you a letter, asking you to sign the signature card which you have in front of you, plaintiff's Exhibit 15? A. Yes.

Q. And in that letter was there any reason expressed why he wanted this account opened?

A. I don't recall.

Q. Do you recall when that letter was sent to you? A. The date the card is.

Q. Do you recall receiving that letter on that date? How can you receive a letter on the date the card is signed? Isn't that the same date on that card? [224]

Mr. Lohse: Your Honor please, I shall offer objection to that. I submit Mr. Maxwell is cross-examining his own witness.

Mr. Maxwell: Your Honor, I believe this is the sister of the defendant.

The Court: Objection overruled.

Q. Did you affix that date on that card?

A. No.

Q. Where were you on that date?

(Testimony of Mrs. Phyllis Dupuis.)

A. Hubbardsville.

Q. Do you recall receiving a letter from Dr. Wayne P. Kelley on or about that date? Do you have a recollection yourself of receiving such a letter?

A. I have a recollection of receiving a letter.

Q. Do you recall what the date of the letter was?

A. Around this time.

Q. Do you recall what the letter said?

A. No.

Q. Do you recall it said anything other than you were to simply sign that card and send it back?

A. That was enough.

Q. You would have done it whether or not any reason was assigned in the letter, is that correct?

A. Yes.

Q. Do you have any positive recollection whether any reason was [225] assigned in that letter?

A. I do not know.

Q. Was there a reason given in the letter, or do you recall?

A. I don't recall.

Mr. Maxwell: You may inquire.

Recross Examination

Q. (By Mr. Lohse): Mrs. Dupuis, the fact that the signature card in the Security National Bank bore your signature, which was sent to you by Dr. Kelley, had you had any prior conversations about funds with your brother, Wayne Kelley, concerning the execution of that card?

A. I recall having one telephone conversation

(Testimony of Mrs. Phyllis Dupuis.)

with my brother Wayne in connection with the card.

Q. When Mr. Maxwell asked whether you would have signed that without your brother Wayne having suggested or evidenced any particular reason, you replied you would have, is that correct?

A. Yes.

Q. And is your reply by reason of the fact that you previously testified on my cross examination that he had had difficulties with his first wife?

A. That is right.

Mr. Lohse: If your Honor please, while conferring with your Honor previously at the bench, it was stipulated between counsel for the government and counsel for the defense that the defense might call Mrs. Dupuis now at this time as a [226] witness in this case and that by calling her at this time it would not constitute a waiver of our right to make any motion which might appear proper at the conclusion of the government's case. With that understanding, I should like, at this time, to examine Mrs. Dupuis as a witness for Dr. Wayne P. Kelley, the defendant.

The Court: The record will show the stipulation and understanding between Court and counsel. The witness is now a witness of the defendant.

Direct Examination

Q. (By Mr. Lohse): Mrs. Dupuis, where did you attend grammar school?

A. Hamilton—pardon me, in Hubbardsville.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Did you attend grammar school for eight years there? A. Yes.

Q. Where did you receive your high school education? A. Hamilton.

Q. How far from Hubbardsville is Hamilton?

A. About five miles.

Q. Did you attend high school there for four years? A. Yes.

Q. Did you graduate from high school in Hamilton? A. Yes.

Q. Thereafter what additional education did you receive? A. Syracuse University.

Q. For how long? [227] A. Four years.

Q. Did you receive any degree?

A. A.B. and I went back for my graduate work.

Q. When did you receive your A.B. from Syracuse University? A. 1938.

Q. And your post-graduate degree?

A. In 1944.

Q. Did that complete your formal education?

A. I have taken graduate courses.

Q. Except for that, however, did that complete your formal education? A. Yes.

Q. What was your occupation after you graduated? A. A teacher.

Q. Where and for how long?

A. Spring Valley, New York for five years and I went back to Syracuse, then Hamilton, New York, taught, and then State Teachers College, back to Syracuse, took specialized work in speech ther-

(Testimony of Mrs. Phyllis Dupuis.)

apy, speech correction, then to Philadelphia and more teaching.

Q. How recently have you taught?

A. Up until I was married.

Q. And you are not teaching then at the present time? A. No.

Q. Mrs. Dupuis, who deferred the cost of your education? [228] A. My parents.

Q. Does that include the education which you received your master's degree and graduate work?

A. No, my under-graduate work.

Q. How far is Syracuse from the family home?

A. About 60 miles.

Q. During the time you attended school there, you remained away from home, did you not?

A. Yes.

Q. And it has been a fact that your parents deferred the cost of your books, your tuition and your living expenses while in college?

A. Yes, except for my doing work on a scholarship basis.

Q. In point of time, during the course of your education, did you have a scholarship?

A. I had a fellowship until I graduated.

Q. After you graduated from college, was there any further study? A. Yes.

Mr. Maxwell: I can't see the relevancy of this line of questioning.

The Court: I assume counsel is going to come to the point.

(Testimony of Mrs. Phyllis Dupuis.)

Mr. Lohse: I submit, your Honor, it is our purpose to tie this line of questioning in.

The Court: Very well, proceed, let us tie it up.

Q. Do you recall the type of farming operations carried on by your father at the ranch at Hubbardsville? A. Yes.

Q. Would you describe it please?

Mr. Maxwell: What date?

Mr. Lohse: Prior to these things, when she was living at home.

Mr. Maxwell: That is what I would like to know, what date?

Q. When do you first recall going to Hubbardsville to live?

A. I was born on the farm in 1918.

Q. And from and after your birth, until you left home to go to school, Mrs. Dupuis, did you have occasion to observe the general activity carried on by your father in connection with the operation of that farm?

A. Yes, I always worked on the farm.

Mr. Maxwell: I object to this line of testimony as being too remote. The government has not presented evidence except as to the years 1948 to 1952. In addition to that, I do not see the purpose.

The Court: I assume, counsel, Mr. Lohse is going to connect this up.

Mr. Lohse: That is my intention, your Honor.

The Court: Go ahead.

Q. You were born in 1918? [230]

A. Yes.

(Testimony of Mrs. Phyllis Dupuis.)

Q. You graduated from college in 1938. For how long a period of time after you graduated from college did you actually reside at home?

A. I lived there all the time.

Q. During that period of time what type of activity, if you know, did your father engage in?

A. Operated the farm, raised produce, such as beans and peas. We sold the products.

Q. Do you recall whether or not, during your life on the farm, your brother, Wayne Kelley, took any part in the operation of the farm with your father? A. Yes.

Q. Will you briefly describe to the jury, if you can, what that part was that you observed?

A. My father carried on the raising, growing of beans and peas, regular farm work, in addition to the dairy farm. They trucked some produce, or rather my brother Wayne trucked the produce, to the Philadelphia and New York markets.

Q. In connection with the actual crops and shipment of the farm produce, Mrs. Dupuis, did your brother ever assist your father in connection with the packaging and marketing of the produce?

A. Yes; wired baskets, bushel baskets of peas and beans that had to be shipped immediately, so they wouldn't spoil.

Q. During the harvest season? [231-233]

A. Yes.

Q. Do you know whether your father ever hired any help on the farm during the harvest season?

A. He hired help the year around.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Generally, if you know, what was your brother Wayne's activities in the matter of cultivation and harvesting and marketing of the crops during the time that you lived on the ranch?

Mr. Maxwell: Objected to as asked and answered.

The Court: It may be answered.

A. He ran the tractor, cultivated, plowed, drove the truck, took care of the dairy, milking, anything that had to be done on the farm.

Q. Mrs. Dupuis, what was the relationship with respect to Dr. Wayne Kelley and your father, so far as all three of you children were concerned, if you know?

A. He was very close to my father; closer than he was to my mother.

Q. Was he closer than Winfield, for example?

A. Yes.

Mr. Maxwell: Objected to as immaterial.

The Court: It has been answered.

Q. What was your relationship to your father?

Mr. Maxwell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lohse: I ask that this be marked.

Mr. Maxwell: Do you intend to offer it in evidence, counsel? [234]

Mr. Lohse: Yes.

Mr. Maxwell: In respect to that, your Honor, may I request the offer of proof in the absence of the jury?

Mr. Lohse: Your Honor, I do not believe it is necessary to excuse the jury. I will make that offer

(Testimony of Mrs. Phyllis Dupuis.)

through another witness, but I do wish to have the foundation laid.

The Court: The Court certainly cannot see any materiality on the part of the offer at this time. Perhaps I don't understand the situation.

Mr. Maxwell: I am sure I don't either.

The Court: There is nothing to prevent the offer being marked for identification, as far as I can see.

Mr. Maxwell: That is perfectly satisfactory.

The Court: The offer will be marked B-1 for identification.

Q. Mrs. Dupuis, I hand you what purports to be a photograph and ask you whether you know what that purports to represent?

Mr. Maxwell: Just a moment. The witness is now going to describe the exhibit to the jury.

Mr. Lohse: I have not asked her to testify what it is, only if she knows what it purports to represent.

The Court: Answer yes or no.

Q. That is correct—can you state whether you know what that represents? [235] A. Yes.

Q. Do you know, Mrs. Dupuis, when the photograph of the object represented on that photograph was taken and by whom? A. Yes.

Q. When was it taken? A. Last summer.

Q. And where? A. In Philadelphia.

Q. And by whom was the photograph taken?

A. Taken by my brother Wayne.

Q. Did the object which that photograph shows

(Testimony of Mrs. Phyllis Dupuis.)

remain in your possession, on the premises in your home in Philadelphia at that time? A. Yes.

Q. And for how long a period of time has that object been in your possession?

Mr. Maxwell: There are a number of objects shown in the photograph.

Mr. Lohse: There is one main object portrayed in the photograph, your Honor. Your Honor has seen the photograph. Your Honor please, we would be happy to make an offer of proof in connection with this photograph, in the absence of the jury, if so desired.

Mr. Maxwell: May it please the Court, I assume this [236] photograph is photograph of object which is presently in existence. That being so, this photograph is obviously not the best evidence. This witness has established its present existence. I think the photograph would not be admissible, not the best evidence and any further testimony about it would be prejudicial.

Mr. Lohse: Your Honor, I hardly think that Mr. Maxwell is really serious in that objection. Photographic evidence is certainly permissible.

The Court: You can't advise the Court on that, counsel. I am familiar with it. We are concerned with the materiality.

Mr. Brown: We invited an offer of proof, your Honor. I think it can be settled if an offer were made out of the presence of the jury.

The Court: Make your offer, gentlemen.

Mr. Brown: Out of the presence of the jury?

(Testimony of Mrs. Phyllis Dupuis.)

The Court: Is it offered in evidence?

Mr. Brown: No, an offer of proof.

The Court: Can you proceed with this witness on some other point?

Mr. Lohse: Yes, your Honor.

The Court: I do not want to deter anything you have in connection with that offer. If you can, I suggest you proceed. [237]

Q. Do you recall, Mrs. Dupuis, when your brother Wayne Kelley was married, the first time?

A. Yes.

Q. And when, if you recall, did that marriage take place?

A. On Christmas Day. I don't remember the year.

Q. Might that have been 1929? A. Yes.

Q. Were you present at the marriage ceremony, Mrs. Dupuis? A. No.

Q. Was your mother there? A. No.

Q. Did your father attend the wedding?

A. No.

Mr. Maxwell: I ask that testimony be stricken; obviously not her own knowledge if she did not attend, how did she know?

The Court: Objection overruled.

Q. Did your father attend?

A. No member of my family.

Q. None of your family attended? A. No.

Q. Did you know Elsbeth Kelley? A. Yes.

Q. That was Wayne Kelley's wife?

A. Yes. [238]

(Testimony of Mrs. Phyllis Dupuis.)

Q. Did you have occasion to visit at their home?

A. Yes.

Q. Do you recall at what time or times you visited with them? A. Not frequently.

Q. How frequently?

A. When I was home on vacation and on week-ends.

Q. Can you tell roughly the years or period over which your visits in their home took place?

A. For three or four years after the marriage. They went to Clinton.

Q. During the early portion of the marriage, then, during the first few years, you actually visited at Wayne Kelley's home? A. Yes.

Q. Did you observe, Mrs. Dupuis, the manner in which the doctor and his then wife got along, during the course of your visits? A. Yes.

Q. How would you say their marital life appeared, as you observed it?

Mr. Maxwell: Object to that as calling for opinion and conclusion of the witness.

Mr. Lohse: She can testify what she saw.

Mr. Maxwell: Furthermore, the matter is certainly immaterial as to any financial matters of Dr. Kelley's during the years 1949 to 1952 or prior; whether or not he got along with his wife, I think is clearly immaterial. [239]

Mr. Lohse: Your Honor, it has a very definite bearing, so far as the defense is concerned.

The Court: The witness may answer if she knows.

(Testimony of Mrs. Phyllis Dupuis.)

A. I know that they didn't get along.

Q. And did you observe conditions?

A. I observed things which took place.

Q. Would you describe them as you observed them?

Mr. Maxwell: Objected to as calling for conclusion.

The Court: Objection sustained. She testified they didn't get along. That is as far as it goes.

Q. Do you know Mrs. Tracy? A. Yes.

Q. Was Mrs. Tracy a frequent visitor at the Hubbardsville farm while you were there as a girl?

A. No.

Q. Do you recall that Mrs. Tracy ever visited there?

A. She may have visited there a few times.

Q. If you know, what was your mother's reaction to Dr. Wayne P. Kelley's marriage to Elsbeth?

Mr. Maxwell: Objected to as calling for conclusion, calling for hearsay.

The Court: Objection sustained.

Q. May I ask this question—what reaction did you, as a family, have to the marriage of Dr. Kelley to Elsbeth?

Mr. Maxwell: Same objection. Calls for hearsay; [240] calls for conclusion.

The Court: Well, I think the witness can testify generally as to the family reaction. She was a part of it and that is a very definite thing.

Mr. Lohse: That was the manner in which I thought I had raised it, your Honor.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Can you answer the question? A. Yes.

Q. What was that?

A. I would say that my mother——

Mr. Maxwell: Objected to as not responsive.

The Court: Your family.

A. My family was very much opposed to the marriage.

Q. Do you know, Mrs. Dupuis, whether or not your mother actually became ill as a result of that marriage?

Mr. Maxwell: Objected to as leading question.

Mr. Lohse: It is a question of fact whether she knows or doesn't know.

The Court: She can answer yes or no.

A. Yes.

Q. How large a home was there on the ranch at Hubbardsville, or farm, how many rooms?

A. Fifteen or 17 rooms.

Q. Do you recall that there ever was on the family homestead at Hubbardsville a depository or safe for safekeeping of valuable documents? [241]

A. Yes.

Q. Where was that located in the home specifically?

A. It was located in a closet of a bedroom.

Q. Were any of your valuables kept there?

Mr. Maxwell: Objected to as immaterial.

The Court: The witness may answer.

A. There were valuables——

The Court: The question was, were any of your valuables kept there?

(Testimony of Mrs. Phyllis Dupuis.)

A. My valuables, after 1948, 1949, my mother's papers and mine were kept there.

Q. Do you know, from time to time, what papers, other than those you have just mentioned, were left there, that is, belonging to yourself and your mother, in the place of safekeeping in Hubbardsville?

A. Before that time?

Q. Yes.

A. My brother Wayne had a safe in which he kept papers, and my father.

Q. Do you know where the safe you just mentioned presently is?

A. The safe is in my possession.

Q. Do you recall when, in point of time, Dr. Wayne Kelley removed any of his personal property?

Mr. Maxwell: If she knows. [242]

Mr. Lohse: If she knows.

A. When he came back from the service in 1946 or 1947.

Q. And when did the safe actually come into your possession?

A. My possession?

Q. Yes.

A. At the time that we sold the property.

Q. When you say the property, do you have reference to the sale of personal property?

A. The farm.

Q. That was in 1951?

A. 1951.

Q. And it has been in your possession since that time?

A. Yes.

Q. And still is in your possession?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes.

Q. That is in Philadelphia, your present home?

A. Right.

Q. Mrs. Dupuis, has your mother's estate been probated? A. It is in the process now.

Q. And if you know, who is named as executor of that estate, or executrix?

Mr. Maxwell: May it please the Court, I would like to object to the materiality of this testimony.

The Court: Objection overruled.

Q. Answer the question. [243]

A. I am the executrix.

Q. Mrs. Dupuis, I hand you a document consisting of three sheets and I ask you to state, please, if you know, what that document is.

A. My mother's will. It is a copy of it.

Mr. Lohse: Your Honor please, I should like to offer a copy of the will next in order.

Mr. Maxwell: Your Honor, I have no objection as to the authenticity of the document. I do object to it on the ground the document is not material or relevant to the proceedings.

Mr. Lohse: May I be heard, your Honor?

The Court: The objection is very well taken. The Court will permit it to be marked. That will be received in evidence as defendant's Exhibit C.

Q. Mrs. Dupuis, do you know of what the nature of your mother's estate consists; in other words, what property did she leave at her death?

A. She had a few stocks.

Q. Are you able to state, with any degree of

(Testimony of Mrs. Phyllis Dupuis.)

certainty, the number? A. Shares of stocks?

Q. Yes.

A. Twenty-six; approximate value of all of her personal estate, four or five thousand dollars. [244]

Q. Were those shares all one company, or are they varied?

A. I think there were two, Philadelphia Electric and Lide Limited.

The Court: Mrs. Dupuis, you said the value of your mother's personal property was four or five thousand dollars. Do you mean all the personal property or just the stocks?

A. Stocks, plus any other personal property. It had nothing to do with the real estate.

The Court: I wondered if you were putting five thousand dollars on the stock only or all the personal property. I think now it goes to all personal property.

A. Yes; as yet I am not in a position to know, but I think approximately five thousand dollars.

Q. These items, I understand, are to be probated? A. Yes.

Q. In addition to that, did you and your mother own, at the date of her death, any other property in joint tenancy or otherwise?

A. Joint savings account.

Q. Will you state, if you know, what the amount of that joint savings account was?

A. Twenty-five thousand dollars, which includes sale of the farm. [245]

Q. Was there any other joint savings account?

(Testimony of Mrs. Phyllis Dupuis.)

A. No other joint savings account.

Q. Are there any other joint tenancies? Did your mother own any other property in joint tenancy?

A. Bonds.

Q. What kind of bonds?

A. Government bonds.

Q. If you can recall, how many?

A. The approximate value of five thousand dollars, which were jointly owned or some which were my own.

Q. Other than that there was no other property that belonged to you and your mother which you had in joint tenancy?

A. No.

Q. At the time of her death?

A. No.

Mr. Lohse: With the Court's permission, I should like to read defendant's Exhibit C to the jury.

The Court: You may.

Mr. Lohse: Exhibit C; second sheet;

"I, Iva P. Kelley, residing in the Town of Hamilton, County of Madison, and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my Last Will and Testament in manner and form following, that is to say: [246]

"First: I hereby revoke any and all wills and codicils heretofore executed by me.

"Second: I direct that all my just debts, fyberak and testamentary expenses be paid as soon as practicable after my decease.

(Testimony of Mrs. Phyllis Dupuis.)

"Third: I hereby give and bequeath to my son, Wayne, the sum of \$500.00.

"Fourth: I hereby give, bequeath and devise all the rest of my residue and remainder of my estate, both real and personal, to my daughter, Phyllis, and my son, Winfield, to share and share alike.

"Fifth: I direct that there be no public auction of any of my property whatsoever.

"Sixth: I nominate, constitute and appoint as the executrix of this, my Last Will and Testament, my daughter, Phyllis Irene Kelley, and direct that no bond nor security be required from her for action in that capacity, and she shall have full and complete authority in her discretion to sell, mortgage and pledge any property and asset of my estate at such times and by such methods as to her may seem expedient.

"In Witness Whereof, I have hereunto subscribed by name the 28th day of August, in the year [247] Nineteen Hundred and Fifty-one.

"Iva P. Kelley (L.S.)"

To speed things up, your Honor, and with the permission of counsel, I should like to omit the witnessing portion of the will.

Mr. Maxwell: So stipulated.

Mr. Lohse: Only to make mention of the fact that this instrument is signed on the 28th of August, 1951, was certified to by two witnesses, Benedetta M. Carroccio and Joe Schapiro on the 28th of August, 1950, and then the codicil to the will which is attached to the exhibit:

(Testimony of Mrs. Phyllis Dupuis.)

(Reads.)

“Codicil to Will

“I, Iva P. Kelley, residing in the Town of Hamilton, County of Madison, and State of New York, being of sound mind and memory, do hereby make, publish and declare the following as a codicil to my certain Last Will and Testament, dated August 28, 1951:

“First. I hereby annul and revoke the bequest made as follows: ‘I hereby give and bequeath to my son, Wayne, the sum of \$500.00.’

“Second: In all other respects, I do hereby ratify and confirm my said Last Will and Testament, dated August 28, 1951. [248]

“In Witness Whereof, I have hereunto set my hand and seal this 15th day of January, 1953.

“Iva P. Kelley (L.S.)”

Following which is the usual provision for witnesses and the fact that the witnesses signed in the presence of each other.

(Jury admonished and recess taken at 2:45 p.m.)

3:00 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MRS. DUPUIS

resumed the witness stand on further

Direct Examination

Q. (By Mr. Lohse): Mrs. Dupuis, was your mother during the time you lived in Hubbardsville,

(Testimony of Mrs. Phyllis Dupuis.)

engaged in any business on her own account?

A. Yes.

Q. What was the nature of that business?

A. She bought and sold antiques.

Q. If you know, can you state over what period of time your mother engaged in that antique business?

A. Twenty-five years.

Q. Do you know, Mrs. Dupuis, to what extent, in general terms, did she engage in the antique business?

A. She managed and she had exhibits and the proceeds helped me through school.

Q. Did your brother Wayne, if you know, take any part in the [249] operation of the antique business which your mother engaged in?

A. He drove a truck or a car, trucking home furniture and transporting one thing or another.

Q. That is, totalling up generally, Mrs. Dupuis, there was a constant activity in your house over a 24-hour period?

A. That, in addition to being a farmer's wife.

Q. Were any antique items of furnishings left at Hubbardsville when the farm was sold, Mrs. Dupuis, at the farm?

A. No.

Q. Was there a disposition made of any antiques prior to your mother's death?

A. She kept in storage antiques, family pieces that were more valuable, so in case anything happened to the farm I would have them, to preserve them.

Q. What happened in fact to the storage pieces?

(Testimony of Mrs. Phyllis Dupuis.)

A. I have them in my possession.

Q. Are they in your home in Philadelphia now?

A. Yes.

Mr. Lohse: You may examine.

Cross Examination

Q. (By Mr. Maxwell): Now, I believe you testified that during the period 1914 to 1938 your mother and father ran a dairy farm and had produce, such as beans and peas on the farm as well, is that correct? A. Yes.

Mr. Avakian: I believe Mr. Maxwell has the date [250] wrong. The witness testified she wasn't born until 1918.

The Court: The witness is familiar with the dates. She may correct it.

Q. Is that correct?

A. I was born in 1918. The farm was in operation in 1914.

Q. Were you born on the farm? A. Yes.

Q. And was Wayne born on the farm as well?

A. I believe he was born in Hubbardsville, not on the farm.

Q. When was he born?

A. Thirteen years before me.

Q. Then when your brother Wayne started to medical school in 1928, how old were you?

A. I was ten.

Q. And how old were you at the time your brother Wayne was married on December 25, 1929?

A. Eleven.

(Testimony of Mrs. Phyllis Dupuis.)

Q. And how old were you when your brother Wayne entered medical practice in 1933?

A. Fifteen.

Q. Now let us go back to the time you were ten years old. Can you tell me how much of your farm was under cultivation in 1928?

A. I would say as much as was capable of being under cultivation.

Q. At that time you were in about the fourth grade of school, is [251] that correct?

A. I believe the fifth grade.

Q. Did you work on the farm at that time?

A. I did.

Q. Did your brother work on the farm in 1928?

A. Yes.

Q. All the year? A. Yes.

Q. I believe there is testimony here that he went to medical school in 1928.

A. He went to medical school after he finished Colgate. He graduated from Colgate in 1926 or 1927, went back to Colgate and took his masters, his M.A.; at that point he went to medical school.

Q. Is that about 1928? A. Approximately.

Q. Did he work on the farm all during the year 1928? A. When he wasn't at medical school.

Q. How about the year 1929? This would be when you were eleven years old.

A. I believe he was doing trucking.

Q. Well, was he going to medical school in 1929?

A. Yes. During the summer.

Q. During the summer he did trucking?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes. [252]

Q. How about 1930, when you were twelve years old?

A. I can't remember the exact number of years he was occupied in trucking.

Q. He was occupied in trucking? A. Yes.

Q. Do you know what kind of truck he used?

A. When he was on the farm, he used, as I said, the car converted into a truck, an old Studebaker, but then he purchased a truck to haul produce to New York. The kind I don't know.

Q. Isn't it a fact in 1930 he began trucking for the first time, he purchased a Ford truck to haul produce, is that correct?

A. He purchased a truck.

Q. And that was the first year that he did any produce hauling?

A. He did produce hauling before that in a small way.

Q. And when did he do that, in the summer time? A. Yes.

Q. He was in Colgate University most of that time, teaching and going to school, wasn't he, prior to 1930 and 1928? A. Yes.

Q. So the only work he had was during the summer?

A. And when he got home from college. He lived at home when he went to Colgate.

Q. Do you remember when he started to Colgate?

(Testimony of Mrs. Phyllis Dupuis.)

A. Colgate was four years straight, that would be 1923 to 1927. [253]

Q. How old were you at that time?

A. Very young.

Q. Five years old? A. Yes.

Q. Do you recall when he started in Colgate?

A. I know when he went to Colgate.

Q. Do you recall it? A. Yes.

Q. Do you recall what he did that summer when you were five years old?

A. I recall he worked whenever he was at home.

Q. He worked on the farm, didn't he?

A. Yes.

Q. For your folks? A. Yes.

Q. And he wasn't paid anything for that, was he?

A. Yes, my father and he sold things, they divided the proceeds.

Q. And this was during the time you were five years old. Did you ever see them divide the proceeds when you were five?

A. They did it from that period on.

Q. Did you ever see them, when you were five years' old, divide the proceeds?

A. I don't recollect the exact time. They did.

Q. You remember they did. As a matter of fact, that is what [254] your brother told you, isn't that correct? A. No.

Q. Now where did you reside in 1930 when you were twelve? A. On the farm.

Q. During most of that year your brother was in medical school, am I correct? A. Yes.

(Testimony of Mrs. Phyllis Dupuis.)

Q. And he was married, was he not?

A. Yes.

Q. Did he come home during the summer vacation with his wife?

A. No, they visited; they didn't live at home.

Q. Do you know where they did live?

A. Hamilton.

Q. With Mrs. Tracy? A. I presume so.

Q. Now, I think you testified you assisted in wiring the baskets of produce sent to the market, is that correct? A. Yes.

Q. When was that?

A. Oh, I would say when I was nine, ten—8, 9, 10, 11, 12, up until I was 15.

Q. That would be about 1926 up through about 1929, is that correct?

A. I did other things besides wire baskets.

Q. How much pay did you receive? [255]

A. I received enough to get through college.

Q. Did you put it way in your savings account?

A. I did work on my own——

Q. I am not speaking of work on your own. I am speaking about work you did on the farm, wiring baskets and sending produce to the market.

A. No, I didn't get so much pay; I didn't expect to.

Q. Now you visited frequently, you say, your brother Wayne Kelley and his wife? A. Yes.

Q. When did you make your first visit to them, if you recall, bearing in mind that they were married on December 25, 1929?

(Testimony of Mrs. Phyllis Dupuis.)

A. When Wayne began practicing medicine.

Q. That was after he finished medical school, approximately 1933 and 1934? A. Yes.

Q. When did your father die?

A. 1952, in June.

Q. Had he been in good health until that time?

A. No, he hadn't.

Q. How long had he been in poor health?

A. Oh, two or three years.

Q. And your mother died, I believe you testified, early this year? A. Yes. [256]

Q. Where did she die? A. In Connecticut.

Q. Was she in an institution at that time?

A. She was.

Q. How long had she been in the institution?

A. Two years.

Q. She was incompetent, I believe? A. Yes.

Q. Now while your brother worked on the farm, during the years he was in medical school, 1928 to 1932, do you know if he made thirty thousand dollars a year in the work he did on the farm?

A. I don't know the exact amount.

Q. Do you think it would be possible for him to make thirty thousand dollars a year trucking produce in the summer time?

A. It would be possible.

Q. Do you know how your brother bought his truck?

A. Out of his own money.

Q. Do you know whether or not he borrowed money to buy the truck?

(Testimony of Mrs. Phyllis Dupuis.)

A. He borrowed money from a man.

Q. Who was that please?

A. His name was Still.

Q. Do you know how much money he borrowed from Mr. Still? Did he make a down payment on the truck? A. No. [257]

Q. Now Wayne P. Kelley is your brother, you would do nothing to hurt him, is that correct?

A. No.

Q. Now, I believe you said, Mrs. Dupuis, that you had a joint savings account of approximately \$25,000, is that correct? A. Approximately.

Q. You and your mother? A. Yes.

Q. Do you still have that savings account?

A. Yes.

Q. Did you tell Mr. Brown on the telephone you did not have sufficient money to make the trip out here and asked to have advance made to you?

A. Yes.

Q. And you got advance from the United States marshal to make the trip out here? A. Yes.

Mr. Maxwell: That's all.

Redirect Examination

Q. (By Mr. Lohse): Mrs. Dupuis, you mentioned on cross examination, in response to question by Mr. Maxwell, concerning Dr. Kelley and his borrowing, do you recall at least on one occasion he had borrowed from Mr. Still; where did Mr. Still live, do you know? A. Hamilton.

Q. Do you know when, in point of time, that

(Testimony of Mrs. Phyllis Dupuis.)

loan was made, do [258] you know the year?

A. No; he was in medical school.

Q. Could it have been during the summer of 1930, the year just following his marriage to Elsbeth, his wife?

Mr. Maxwell: The government will stipulate to that, counsel.

Mr. Lohse: We will accept that stipulation, your Honor. We have nothing further.

(Witness excused.)

Mr. Maxwell: Now, may it please the Court, we have one other stipulation with respect to those government bonds owned by Wayne P. Kelley at the beginning of the year 1949 and at the end of that year, end of 1950 and 1951 and end of year 1952. These bonds are all listed individually in a schedule. This schedule is summarized upon a separate sheet of paper, showing the amounts on hand at the end of the year 1948, the amounts purchased during the year 1949, amounts cashed during the year 1949, and amounts on hand at the end of the year 1949. That is done for each year, so it is a summary of purchases, sale and amounts on hand shown on a typed sheet of paper.

It has been stipulated between counsel for the government and counsel for the defendant that these are the war bonds owned by the defendant, Wayne P. Kelley, for the dates shown therein. I will offer these schedules in evidence as government's exhibit next in order. [259]

Mr. Lohse: No objection to their admission.

The Court: The offer will be received in evidence as government's Exhibit No. 118.

Mr. Maxwell: May it please the Court, at this time I would like to read the summary sheet to the jury, Exhibit 118.

(Reads)

Wayne P. Kelley

Summary of U. S. Government Bonds

		Year End Balance
On Hand December 31, 1948 ..	29,400.00	29,400.00
Purchased—1949	3,000.00	
	<u>32,400.00</u>	
Cashed—1949	750.00	
On Hand December 31, 1949 ..	31,650.00	31,650.00
Purchased—1950	3,000.00	
	<u>34,650.00</u>	
Cashed—1950	24,862.50	
On Hand December 31, 1950 ..	9,787.50	9,787.50
Purchased—1951	0	
	<u>9,787.50</u>	
Cashed—1951	7,537.50	
On Hand December 31, 1951 ..	2,250.00	2,250.00
Purchased—1952	0	
	<u>2,250.00</u>	
Cashed—1952	0	
On Hand December 31, 1952 ..	<u>2,250.00</u>	<u>2,250.00</u>

Mr. Maxwell: Your Honor, at this time we have the revenue agent that we can put on as a witness. Other than that, we have, for all practical purposes, run out of witnesses this afternoon. [260]

HARRY M. GREEN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, sir? A. Harry M. Green.

Q. Where do you reside?

A. Sparks, Nevada.

Q. How long have you resided there?

A. Five years.

Q. What is your occupation, sir?

A. I am an Internal Revenue agent.

Q. Where are you stationed?

A. Reno, Nevada.

Q. How long have you been stationed there?

A. Six years.

Q. Prior to that time, what was your occupation? A. I was also Internal Revenue agent.

Q. When did you become an Internal Revenue agent? A. March 1, 1946.

Q. Mr. Green, did you attend the university?

A. Yes, I did.

Q. What university was that?

A. University of Denver.

Q. Did you receive a degree from the university? A. I did. [261]

Q. What degree was that?

A. What they called a Bachelor of Science, an accounting degree.

Q. When did you receive it?

A. The early part of 1946.

(Testimony of Harry M. Green.)

Q. Prior to that time, I believe you testified you became an Internal Revenue agent in March, March 1, 1946? A. That is correct.

Q. Prior to that time what was your occupation?

A. Three and one-half years I had military service. Prior to that time I had two accounting jobs, while going to school.

Q. What was your rank in the military service, what branch?

A. United States Army. I was a sergeant.

Q. Now what are your duties generally, Mr. Green, as Internal Revenue agent?

A. Roughly speaking, there are two. Our job is to make an audit of the income tax returns of various individuals, corporations, partnerships, fiduciaries, whatever is assigned to us, to determine that the correct tax liability has been paid, and then we write a report as to the result.

Q. I take it you have performed many of these audits since March 1, 1946? A. Yes, sir, I have.

Q. Now in the course of your duties as Internal Revenue agent, did you have occasion to investigate the income tax liabilities of Wayne P. Kelley for the years 1949 to 1952? [262] A. Yes, I did.

Q. Can you state, if you know, how the investigation of Dr. Kelley, inquiry into tax liabilities, arose? A. Yes, I can.

Q. And will you state what that was?

A. In the early part of 1951 I had occasion to go to Dr. Kelley for treatment and during those

(Testimony of Harry M. Green.)

treatments I gave the office girl a personal check for the treatments. When the check was returned to me by the bank, I noticed that the checks had all been cashed.

Q. How could you tell that?

A. This particular bank, the First National Bank of Nevada, First and Virginia Branch, uses a stamp, sort of a printed stamp, on the face of the check if they cash the check.

Q. Now let me see if I can find a check here for you that shows that mark. Well, here is a check, plaintiff's Exhibit 82. See if you can find the mark you are talking about on that.

Mr. Avakian: I would suggest it would be better to use Mr. Green's checks. That is the one called to his attention.

The Court: This is just to identify.

A. The first two checks I look at do have this particular stamp on them, represents the checks being cashed.

Q. Will you describe the mark to the jury?

A. Yes. This particular bank, which is the First and Virginia [263] Branch of the First National Bank, uses a—you wouldn't exactly call it a square-printed on the face of the check, and underneath it, in the square itself, would be 94-2, which happens to be the identifying number of the bank. Then underneath it usually there would be a "111", which means that the check was cashed.

Q. Now, do you have you checks with you?

A. I do.

(Testimony of Harry M. Green.)

Q. May I see those checks please? Now you have handed me as well a piece of paper. I will give you that back and I wonder if you will describe the document that you have handed me?

A. Yes. The first item I have here is a check drawn by me on May 2, 1951, to the order of Dr. Kelley, in amount of five dollars. It has a stamp on the face of it—the check is written by me and signed by me—it has a stamp on the face of it; in this particular instance it does not have the “111” symbol. However, the bank sometimes puts “111” and sometimes does not. The next document is merely a receipt with a number, signed by Helen Hill for the same amount, same thing. The document here is a check, also drawn by me, dated May 7, 1951, payable to Dr. Kelley, in the amount of \$20. This also has a stamp on it. Following is an unnumbered receipt of the same date and for the same amount. The final item I have here is a check written by me, payable to the order of Dr. Wayne P. Kelley, in the amount of \$10, dated May 17, 1951, and in this particular instance it [264] does have the number “111” underneath.

Q. Now these checks were given to Dr. Kelley in payment of medical services?

A. They were given to the office girl in payment of services, yes.

Q. Did you make any other payments during the years 1949 and 1952 to Dr. Kelley?

A. No, I did not.

Q. These were the only ones?

A. Yes.

(Testimony of Harry M. Green.)

Mr. Maxwell: I will offer these checks in evidence as government's next in order, including the receipts thereto.

Mr. Lohse: No objection, your Honor, to the admission in evidence.

The Court: The offer will be received as government's Exhibit 119.

Q. Mr. Green, I stopped you in the middle of your story about how the investigation arose. I wonder if you would continue. I think you said you noticed the checks were cashed?

A. That is correct. At that particular time, even now, our job is to keep an eye out, or possibly check out, any individuals or firms that we think require a little further checking when they are in the habit of cashing their receipts, as in this particular case. Then we went over to what they called the Collector of Internal Revenue at that time, at the postoffice [265] and endeavored to find out who had the 1949 and 1950 returns of Dr. Kelley. It is part of our job to make a personal check on any taxpayer that we have a question about. We found that one year's return, I believe it was 1949, had been picked up by the office auditors there in the Collector's office because the doctor had claimed depreciation and expenses of an airplane in connection with medical practice. It appeared to me——

Q. I would like to have you testify as to what you did and in that connection what was done, rather than your conclusions.

(Testimony of Harry M. Green.)

A. I suggested to the Collector's office at that time that the returns should be probably assigned to the San Francisco Internal Revenue agent's office and then reassigned to one of the agents in the Reno office.

Q. Now the Internal Revenue agents were different at that time from the Collector, is that correct?

A. That is correct.

Q. That was a different agency?

A. That is right. The Collector's office handled smaller returns. The agent's office handled larger returns. This seemed to be a larger type of returns, that is why I suggested it be sent to San Francisco.

Q. Was it then assigned to your office for audit?

A. It was.

Q. And did you have the investigation at that time? [266]

A. No, I did not.

Q. Was it assigned to you?

A. No sir, it was not.

Q. When was it assigned to you, sir?

A. In approximately January or February of 1953.

Q. Did you do anything on the case prior to the time it was assigned to you?

A. The only thing I did on the case was to sit in at an interview which was prepared by the agent when the first assignment came in.

Q. Who was that, do you know?

A. Vern C. Heppner.

(Testimony of Harry M. Green.)

Q. I believe you said you sat in on an interview with him?

A. With him and the doctor, I did.

Q. Do you recall when that interview was?

A. Yes, I do.

Q. When was it?

A. It was on February 29, 1950.

Q. Where was the interview held?

A. It was held in the agent's office, which was in Room 302, Clay Peters Building, Reno.

Q. Who was present?

A. There were just the three of us, Mr. Heppner and the doctor and myself.

(Jury admonished and recess taken at 4:30 p.m.) [267]

Tuesday, April 3, 1956

10:00 a.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: There was a witness on the stand on the part of the government, Mr. Green.

Mr. Maxwell: Yes, your Honor. With the permission of the Court and counsel, we would like to withdraw that witness at the present time and recall a witness for just a short piece of testimony and also for one stipulation.

Mr. Lohse: We will be very happy to cooperate on that basis.

The Court: Very well, counsel, you may proceed.

Mr. Maxwell: A further stipulation has been

made between the parties to this matter, to the effect that a representative of the Home National Bank of Eureka, Kansas, if called as a witness, would testify that there was one commercial deposit with the Home National Bank at Eureka, Kansas, in the name of Lois W. or Lillian Kays on the following dates and in the following amounts: December 31, 1948, \$226.20, December 31, 1949, \$202.40.

It is further stipulated that a representative of the Ultra K Distributing Company, if called as a witness, would testify that the records of the Ultra K Distributing Company, 315 Sansome Street, San Francisco, California, disclose that Dr. [268] Kelley invested \$20,000 in this enterprise in October of 1952 and that this investment was still retained on December 31, 1952.

It is further stipulated that a representative of the Federal Water and Gas Company, if called to testify, would state that Dr. Kelley owned 60 shares of the stock of the Federal Water and Gas Company on December 31, 1948, at a cost of \$1050, and that this stock continued to be owned by Dr. Kelley up to and including December 31 of 1952. Is that correct, counsel?

Mr. Lohse: That is right.

Mr. Maxwell: Your Honor, those stipulations and the two stipulations with respect to bank accounts in New York, which were read heretofore into the record, have been made the subject of a typewritten piece of paper and the copy I have is a little bit dog-eared, but with the Court's permis-

sion, I will have it retyped and made an exhibit in this case.

Mr. Avakian: That is agreeable. Would the Court like to have the exhibit number now?

The Court: Do you wish that done, counsel?

Mr. Maxwell: That will be satisfactory, your Honor.

The Court: The offer will be received in evidence in retyped form and will be marked government's Exhibit 120. [269]

VERNON HEPPNER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Vernon Heppner.

Q. What is your occupation?

A. I am a certified public accountant.

Q. What was your occupation in 1951 and 1952?

A. Internal Revenue Agent.

Q. Have you been subpoenaed to testify in this matter? A. Yes, I have.

Q. Mr. Heppner, may I call your attention to the year 1951 and ask you if you were assigned any investigation of income tax returns of Dr. Wayne P. Kelley? A. Yes, I was.

Q. Do you recall when those returns were assigned to you for investigation?

A. I believe it was during the month of September.

(Testimony of Vernon Heppner.)

Q. 1951? A. 1951.

Q. And did you talk to Dr. Kelley at any time during the year 1951? A. Yes.

Q. Did you have occasion to examine any of the records of Dr. Kelley during that year? [270]

A. Yes.

Q. Can you tell me the occasion of your first visit to Dr. Kelley, what happened and what you did?

A. Well, I think it was a routine matter. I made a telephone call and talked to the doctor and made an appointment, and as I recall, I believe I went over to his office the first time I met him.

Q. Had you talked to Mr. Green previous to that time about the case?

A. I don't recall about that.

Q. I wonder if you can tell us what occurred at the doctor's office?

A. Well, I asked to see—I had the returns and I asked to see the records and see what records he had and try to substantiate the figures on the return.

Q. And did he show you the records?

A. Well, I don't recall now whether the records were at the office or whether they were kept at his home, but I know at that time we had a discussion and I think I looked those records over.

Q. Did you ever have occasion, between that time and January, 1952, to look over the patient cards and receipts by the doctor?

A. Yes, I did.

(Testimony of Vernon Heppner.)

Q. Did you ask for one patient card in particular? A. I did.

Q. What patient card was that? [271]

A. Mr. Harry Green.

Q. Were you able to find that card?

A. No, sir.

Q. Did you look through all of the cards at that time that were made available to you by the doctor?

A. I believe I did, yes.

Q. Now in your conversations with Dr. Kelley, did you ask him for any information with respect to his assets and liabilities?

A. Yes, I did. I asked him for financial statements.

Q. When did you ask him for that, if you recall?

A. I believe it was some time prior, shortly around Christmas, 1950.

Q. Did the doctor furnish you with such information? A. Yes, he did.

Q. How did he furnish that, orally?

A. No, he gave me written statements.

Q. Do you have those statements with you?

A. Yes, I do.

Q. May I have them?

Mr. Lohse: We have no objection to the admission of the number of statements in evidence.

The Court: The statements will be admitted in evidence as government's Exhibit 121.

Q. Now, Mr. Heppner, do you know who prepared those statements?

A. As far as I know, the doctor prepared them.

(Testimony of Vernon Heppner.)

Q. Did you ever talk to an accountant, or any other representative of the doctor's at that time?

A. No, sir.

Q. Did he ever mention such representative?

A. No, sir.

Q. Can you state the date upon which they were furnished to you?

A. It was January 10, 1952.

Q. As of what dates is the information set out on those statements?

A. As of January 1, 1946 and December 31, 1950.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mr. Heppner, when did you leave the Internal Revenue Service?

A. In December of 1952.

Q. And have you been connected with the Internal Revenue Service since then?

A. What do you mean?

Q. Employed by them? A. No, sir.

Q. Or by any other government agency?

A. No, sir.

Q. These documents, Exhibit 121, the net worth statements, were obtained by you in the course of your investigation? A. Yes sir.

Q. Are these supposed to be kept in the custody and for the purpose [273] of the Internal Revenue Service? A. Yes.

Q. Can you explain how it is that you happen

(Testimony of Vernon Heppner.)

to have them this morning when Mr. Maxwell asked for them?

Mr. Maxwell: I can explain that. I gave them to him this morning at ten o'clock.

Q. Do you have any memorandum or reports of any kind, as to the work you did on this matter, or are you testifying simply from memory?

A. I am testifying from memory.

Q. On what do you base your recollection it was January 10, 1952, that particular date, these statements were given to you?

A. As I recall, that is the date I picked them up and the doctor signed them, as stated, on that date.

Q. You were present when they were signed?

A. Yes.

Q. You stated that this was assigned to you in September of 1951?

A. I believe that is correct.

Q. That again is based on your recollection?

A. Yes sir.

Q. Have you refreshed that by any recent examination of any records which will show more exactly?

A. Yes.

Q. How long ago was that? [274]

A. In the past several days.

Q. What type of record did you examine?

A. I have a record of my sheet, sort of a score sheet, reports I submitted.

Q. Did you submit reports on this matter?

A. I submitted monthly reports at the time I

(Testimony of Vernon Heppner.)

was assigned the work on each particular case and the individual examination on that date.

Q. That was from the sheet? A. Yes.

Q. That did not contain any notations as to what you had done about the matter?

A. No, it was merely a daily report of the time spent.

Q. Did you prepare any memoranda setting forth or summarizing the work that you did on this case? A. No, I made——

Mr. Maxwell: I wish to object to this, in the first place, if this agent did prepare report, it would be immaterial; second, it is beyond the scope of direct examination.

The Court: It seems rather relevant. The witness may answer. Objection overruled.

A. I believe I prepared memorandum of some facts, yes.

Q. You use the word “believe”, I am not trying to press you if you do not remember, but I would like to know whether you are definite in that or not. Are there any circumstances, so far as [275] you know, in the memorandum prepared by you, setting forth the results or summarization of your discussions with the doctor or Mrs. Kelley, or summarizing any other phase of work you did on this matter while assigned?

A. Well, they are not in my possession.

Q. I understand that.

A. I made notes when I was working on the

(Testimony of Vernon Heppner.)

case, which were left in the files when I left, but I have no notations of this.

Q. Were these work sheets, or work facts, that you prepared, or did you prepare a report to submit to your superior?

A. No, no report, merely memorandum.

Q. And I take it the last knowledge you have of those work notes or memoranda is that you left them in the Internal Revenue Service when you left the Service? A. Yes.

Q. You said that you looked specifically for a patient card relating to Harry Green. Harry Green was an Internal Revenue agent at that time?

A. Yes.

Q. You said that you do not recall whether you had previously talked to Harry Green about this matter or not. Do you recall your testimony on that? A. Yes.

Q. On what do you base your testimony that you looked for this [276] particular card, Mr. Heppner?

A. Well, I do not recall whether I saw the doctor at his office more than one time. I do know that I did discuss the matter with Mr. Green and after knowing Mr. Green was a patient of the doctor's, I just looked for the card.

Q. And you recall that you looked for that particular card?

A. That particular card, yes. I knew he was a patient. I wanted to look for that particular card.

Q. Had Mr. Green told you he was a patient?

(Testimony of Vernon Heppner.)

A. Yes, he did.

Q. Had Mr. Green told you that he had requested that Dr. Kelley's returns be assigned to the Internal Revenue Office for investigation?

A. I do not recall that, sir.

Q. Do you recall the circumstances under which Mr. Green told you he was a patient?

A. I believe Mr. Green knew I had the assignment.

Q. If you know, can you tell us how he knew that?

A. I probably told him.

Q. How many cases did you have assigned to you for investigation at that time, Mr. Heppner?

A. At that particular time I would say it was in excess of one hundred, one hundred fifty possibly, at that particular time.

Q. Referring now to around the latter part of 1951?

A. Yes. [277]

Q. You had an active case load of that many different taxpayers, is that right?

A. That many different returns. I wouldn't say that many different taxpayers. May have had several returns from the same taxpayer.

Q. Do you recall that a few minutes ago in the hallway you mentioned to me at the time you left the service, approximately a year later, I believe, you had 260 case load?

A. Yes.

Q. And your case load increased substantially from 1951 to 1952?

A. Substantially, yes.

Q. Do you recall whether there was any particu-

(Testimony of Vernon Heppner.)

lar reason why you mentioned to Mr. Green that you had Dr. Kelley's returns for investigation?

A. No, I don't recall whether there was any particular reason. At that time we frequently discussed tax matters and I think it was just in the regular course of conversation that that came about.

Q. How long after you first talked to Dr. Kelley was this matter assigned to you for investigation?

A. That I don't recall, sir.

Q. Bearing in mind that the net worth statement, Exhibit 121, has typewritten date January 7th, and you testified it was signed in your presence on January 10, 1952, can you tell us approximately [278] how long before that you first contacted Dr. Kelley?

A. Well, as I testified earlier, I believe I contacted him the first trip, September, 1951.

Q. Was that almost immediately after the matter was assigned to you?

A. I can't recall that, sir, I don't know.

Q. Mr. Heppner, in the latter part of each year, while you were working for the Internal Revenue Service, and including the latter part of the year 1951, is it not true that you were concentrating your attention on pending charges on which you were working, on which the statute of limitations would be expiring the following March 15th?

Mr. Maxwell: Objected to as wholly immaterial.

The Court: The objection is good.

Q. Mr. Heppner, was it customary and usual for you, at that time, when a matter was first assigned

(Testimony of Vernon Heppner.)

to you for investigation, to start work on that particular case almost immediately?

Mr. Maxwell: I will object to that as immaterial. The question is what did he do in this particular case.

Mr. Avakian: I think, your Honor, it goes to something more fundamental.

The Court: Restate the question.

Q. Mr. Heppner, at the time that you were assigned the Kelley matter for investigation, was it customary and usual for you, with the case load that you had at that time, to commence work [279] almost immediately on a matter that had just been assigned to you?

A. Well, I think that has been up to the discretion of the agent who started the examination. I don't recall any other circumstances that made it otherwise.

Q. Isn't it a fact that in comparison with what you were doing generally on cases of that kind, you started this investigation much more quickly after it was assigned to you than you were doing generally?

Mr. Maxwell: Objected to as argumentative and immaterial.

The Court: The witness may answer.

A. I do not believe so.

Q. Does all this questioning and discussion refresh your recollection at all, Mr. Heppner, as to whether Mr. Green was interested in having Dr. Kelley's returns examined?

(Testimony of Vernon Heppner.)

A. No, I don't believe that had anything to do with it at all. I got my assignment from the San Francisco office. It was assigned down there and as far as I was concerned, it was a routine assignment and I was to take the case and do as I saw fit.

Q. Did Mr. Green tell you that he had requested that Dr. Kelley's returns be assigned to the Internal Revenue office for investigation?

A. No, I don't think he did. [280]

Q. He didn't tell you? A. I don't think so.

Q. After you obtained the net worth statements, Exhibit 121, would you tell us what you did on this case after that?

A. Some time later Dr. Kelley was called into the office, about four o'clock, and Mr. Green was with me at that time.

Q. And do you remember when that was?

A. Oh, I think it was January or February, 1952.

Q. In other words, within a month or so after the statements were taken?

A. Within a month or so.

Q. Now at that time you and Mr. Green and Dr. Kelley were present? A. Yes.

Q. Was anybody else present? A. No.

Q. Was Mr. Green assigned to the case at that time? A. No, he wasn't.

Q. Was any record made of that discussion?

A. I think we made notes, yes.

Q. There was no stenographic transcription of it? A. I do not believe there was, no.

(Testimony of Vernon Heppner.)

Q. Who made the notes, you or Mr. Green?

A. We both made our own notes.

Q. What happened to those notes? [281]

A. They were turned in to the Service.

Q. Do you recall the substance of that conversation?

Mr. Maxwell: Objected to as way beyond the scope of direct examination.

Mr. Brown: I think, your Honor, the question is how far he can go. If he wants to call Mr. Heppner as his own witness, we have no objection, but this is way beyond the scope of direct examination. If we could see some particular purpose, we wouldn't object.

The Court: Objection is overruled.

Q. Do you recall what was discussed at that conference in January or February, 1952, when you and Mr. Green talked to Dr. Kelley?

A. Well, I think we had a general discussion about the doctor, when he started practice, when he came to Nevada.

Q. Is that the best you can recall of that conversation at that time?

A. No, I believe probably that we discussed matters concerning the financial statement, possibly, but I recall we started asking questions, general questions about the doctor, how long he had been practicing and where he practiced and things of that sort.

Q. And can you, without referring to your notes, recall the answers that he gave you?

(Testimony of Vernon Heppner.)

A. Well, there were a lot of questions and a lot of answers. [282] If you ask me a question, probably I can recall the answer I may have gotten, but to give a memorandum of that discussion, I couldn't.

Q. I understand that and appreciate that, Mr. Heppner. Then after that conference, what else did you do on this case?

A. I just don't recall whether I did any more on that or not.

Q. When was it that you left the Internal Revenue Service? A. In December of 1952.

Q. So that from January or February, 1951 until December of 1952, you don't recall at this time any activity on your part in this investigation, is that right? A. No, I do not.

Q. Did you take any of Dr. Kelley's records from his office? A. No, I never.

Q. Whatever you examined, you examined at his office?

A. At his office and home, but I never took any records from him.

Q. You were also at his home? A. Yes.

Q. Do you remember approximately when that was?

A. I believe it was December of 1951 and January, 1952.

Q. Was that on more than one occasion?

A. Yes.

Q. Do you recall the people present at that time?

A. I think Dr. Kelley was there and the children and Mrs. Kelley.

(Testimony of Vernon Heppner.)

Q. In all these discussions you had with doctor and Mrs. Kelley, [283] did you ever ask them for anything which they declined to do?

A. No, I don't think so.

Q. And you testified that at the time you looked for Harry Green's patient card at the office, you did not ask Dr. Kelley specifically for that patient card on Harry Green?

Mr. Maxwell: I do not remember that to be the witness' testimony.

The Court: I do not think so.

Mr. Avakian: I believe I asked him in my cross-examination if he asked Dr. Kelley for the Green patient card.

Mr. Maxwell: I still don't recall it.

Mr. Avakian: I will repeat it then.

Q. So we can clarify it, did you at any time ask Dr. Kelley if he had the patient card of Harry Green? A. I do not recall that I did.

Q. Since you were looking for that particular card, can you explain why you didn't ask him if he had that particular card?

A. No, I don't know why I didn't. I thought all the cards were there and I just thought I would take a look for it myself.

Q. Was it not customary for you, Mr. Heppner, in conducting your examination of taxpayers, if you were looking for some particular thing you couldn't find, to ask the taxpayer if he had it?

Mr. Maxwell: Objected to as argumentative.

The Court: He may answer. [284]

(Testimony of Vernon Heppner.)

A. Well, if I believed the cards were all there, I could look for them myself. That is why I did it.

Q. Perhaps you didn't understand my question. Let me repeat it. In conducting your examinations generally of the returns of taxpayers, was it not your custom, when you were unable to find some particular thing you were looking for, to ask the taxpayer if he could help you find it?

A. Generally I believe that is true.

Q. But you didn't follow that in this case, however, did you? A. No.

Mr. Avakian: Your Honor, in view of the witness' testimony that he can't at this time remember the details of the discussions with Dr. Kelley, and his testimony he did make notes of those matters, I would like to make a demand on the government for all records of memoranda made by Mr. Heppner, or any one associated with him in the course of this investigation.

Mr. Maxwell: Your Honor, counsel has called for production of the entire file. It contains confidential matters, as the Court is aware. Secondly, counsel went way beyond the scope of direct examination in asking this witness with respect to that conversation. If he had called him as his own witness, there might be some excuse; he would be entitled to see such memorandum. I think in any event the witness' testimony is the best evidence.

Mr. Avakian: If I may be heard, your Honor. First, I [285] am not asking for the entire file. I am asking only for memorandum made by Mr. Heppner

(Testimony of Vernon Heppner.)

and any one else who was associated with him while he was making this investigation. Second, this whole matter was opened up by the introduction of the financial statements on direct examination and I think your Honor is aware of the rule in the Holland case. In a net worth case the government has the obligation, and it has the burden of proof, to make a reasonable investigation of all leads furnished by the taxpayer, and I think under the rule of that case, the introduction of net worth statement obtained from the doctor makes it obligatory that the government come forward with anything sought in connection with it at this time.

Mr. Maxwell: If this was an ordinary net worth case, confined to net worth proof, I would agree with counsel, the government is required to show it followed up all leads. However, the government has to prove specific unreported income from approximately 200 patients and there is no requirement that the starting point or origin be investigated in connection with net worth proof. Here we have only to show specific unreported income for each one of these years.

Mr. Avakian: Your Honor, may I call the Court's attention to one of the items on the net worth statement as of 1946?

The Court: The Court will take the question under advisement and rule.

Mr. Avakian: I would like to correct, for the record, [286] the grossly erroneous statement that there has been proof of unreported income from

(Testimony of Vernon Heppner.)

200 patients. The testimony has related to less than 100 patients and as of now there has been no proof as to which portion relates to unreported income and which not, and I believe, on the contrary, when this is developed, it will appear that as to a large number of patients exactly the amounts they testified was reported, and I do not think that this statement of Mr. Maxwell's, made in the excess of enthusiasm perhaps, should register with the jury without that observance.

Mr. Maxwell: My statement was that we have shown, and will show——

The Court: Ladies and gentlemen, you will see the wisdom of instruction the Court will give you, comments and discussions of counsel will not be considered by you as any part of the evidence in this case. You are to disregard the comments of counsel.

Q. Mr. Heppner, will you relate to us, as best you can remember it now, any other subjects that you discussed with Dr. Kelley during the course of your investigation?

Mr. Maxwell: Objected to as beyond the scope of direct examination.

The Court: Objection overruled.

A. It is rather a difficult question to answer. We discussed many items and I presume I talked about items on the return which [287] I felt warranted discussion.

Q. I was not asking you for your assumptions or presumptions, simply what you remember now, if

(Testimony of Vernon Heppner.)

anything, and if you do not remember, I can understand that.

Mr. Maxwell: I do not think the witness finished.

Mr. Avakian: He was talking in terms of assumption, which I assume was related to general practice. That was not the question.

Q. The question is related to Dr. Kelley in this case, toward items, in other words, that you may remember now as having discussed.

A. I do not recall item by item.

Q. This likewise, I take it, would be reflected in your work notes that you left with the government when you left the Internal Revenue Service?

A. That is right.

Q. And those topics discussed would, I take it, be reflected in the work notes which you left with the Internal Revenue Service at the time you left the Service.

A. If I made notes of it, I am sure they would, yes.

Mr. Avakian: Except for my request for this memorandum or reports and whatever may develop, that completes the cross-examination of this witness. Perhaps he can wait until the noon recess.

The Court: Well, the Court desires to closely examine [288] Exhibit 121 during the recess, before the Court rules on that.

Mr. Maxwell: Your Honor, we have no re-direct examination of this witness. Does Mr. Avakian wish to keep this witness here? Is that my understanding?

(Testimony of Vernon Heppner.)

The Court: Well, the Court will ask the witness to stay.

Mr. Maxwell: So far as the government is concerned, he may be excused. Any objection to the witness remaining in the room, or do you want him to remain under the rule?

Mr. Avakian: I think he had better remain under the rule.

(Witness temporarily excused.)

HARRY GREEN

having been previously sworn, resumes the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Green, last night, if you recall, you were about to embark into conversation which you had had with Dr. Wayne P. Kelley in company with former Internal Revenue agent Vernon Heppner, who just left the stand?

A. Yes.

Q. And what was the date of that interview again? A. February 29, 1952.

Q. And who was present?

A. Dr. Kelley, Mr. Heppner and myself. [289]

Q. Were you assigned the case at that time?

A. No, sir, I was not.

Q. How did it happen that you were in on this conference?

A. Mr. Heppner asked me to sit in and try to take notes in connection with the items.

Q. Did you do that? A. I did.

(Testimony of Harry Green.)

Q. Now, Mr. Green, I have handed you Exhibit 121 in evidence, and you may refer to that exhibit during the following questions. Let me ask you if you recall the conversations which you and Mr. Heppner had with Dr. Kelley on February 29, 1952? A. I do.

Q. Can you state the substance of that conversation? A. I can.

Q. Please do so.

A. As mentioned yesterday, the conference was held in the Internal Revenue office with address in Reno, February 29, 1952, and questions that were asked the doctor pertained primarily to financial matters and in essence answers that we got from the doctor were about like this—the doctor was questioned regarding this cash on hand figure.

Q. How much is that?

A. As of January 1, 1946 it shows cash on hand, not in bank, \$119,000.

Q. Is that approximate or exact? [290]

A. The word used here is approximate.

Q. Continue.

A. The question went first of all as to the matter as to how this cash was acquired. The doctor stated that he had acquired the money over a period of the early thirties, stating first of all that as of the time that he got out of grammar school, he had five thousand dollars in cash. He stated further that around 1928 he had fifty thousand dollars in cash. In regard to a further question, regarding the year 1933, he stated he had 75 thousand dollars in cash. He

(Testimony of Harry Green.)

further stated that during the years 1928 to 1931 he had earned approximately 35 thousand dollars during the summer months, by hauling produce to markets, doing tutoring work, and working on the farm. When asked whether a tax return had been filed for these years, he stated that he had not. These years are 1948 and 1951. He stated the first year he filed a tax return was 1933. He further stated, in regard to this 119 thousand dollars in cash, that he had obtained that figure by two methods. First of all, when he prepared the December 31, 1950 net worth statement for Mr. Heppner, he had listed all the assets he had at that time and then had made a computation as of 1946 regarding the cash, using the income that had been reported between the years 1946 and 1950 inclusive, and figured out that he had that much cash on hand. When questioned further on that point, he stated that he thought that the figure was about right because he had 110 thousand dollars on [291] his mother's farm in Hubbardville, New York in 1946.

Q. I do not understand that computing for 1950 net worth statement. I wonder if you can explain that?

A. Briefly, he put down the assets he had at the end of 1950. Then he knew what other assets, besides the cash, that he had in 1946. To that he added the income reported on the tax returns between 1946 and 1950 and any difference which would show an unreported income figure was shown as cash on hand.

(Testimony of Harry Green.)

Q. In other words, the increase he couldn't account for during that four-year period of time, he made up by increasing his cash on hand at the beginning of 1946?

A. Yes, the doctor's word was that he backed up. He further stated, in regard to this currency he had on hand in 1946, which he stated he had in the early thirties, which would be 75 thousand dollars on hand in 1933, that no one knew about the currency except possibly his present wife, to whom he believed he had mentioned the matter to in 1946. He mentioned that his father was dead, he might have known about it, but he didn't think he had. He mentioned he didn't recall whether his mother knew or not. At the time of the interview, the mother was incompetent and could not verify one way or the other. That was the doctor's statement. As regarding questions of how he brought this money out from the farm, he stated he had brought it out in two trips, one being in 1947, when he brought it in a suitcase by plane and train from Hubbardsville, New York. He stated that the amount [292] at that time that he brought out was approximately 50 or 60 thousand dollars in 50 and 100 dollar bills. The second part of this money was brought out the next year, 1948. He stated that this was brought out in his own private plane, also in 50 and 100 dollar bills, and that the amount at that time was about 50 or 60 thousand dollars, the two totals making up roughly 115 thousand dollars. The doctor further stated to both Mr. Heppner and myself that he had

(Testimony of Harry Green.)

not given a financial statement to any one, he had never made any gifts to any one of \$500 or more. He had never given his father any money and that as regards the settlement with his first two wives, the first one being Elsbeth, the second Maxine, that he had made little, if any, financial settlement. I think those are the important points I recall.

Mr. Avakian: May I inquire whether the paper before the witness is a memorandum referred to or if he is speaking from memory?

Mr. Maxwell: It is Exhibit 121.

Mr. Avakian: That is the net worth statement?

Mr. Maxwell: I believe so.

Mr. Avakian: The witness has had no memorandum before him?

Mr. Maxwell: He has not.

Q. Now as you recall, this conversation took place February 29, 1952? [293]

A. Yes, it did.

Q. Thereafter, was the case assigned to you, Mr. Green?

A. It was, approximately a year later.

Q. Do you recall the approximate date?

A. It was somewhere the latter part of January, 1953.

Q. Did you start any investigation at that particular period of time?

A. No, sir, I didn't do anything on the case until approximately October, 1953.

Q. You had other investigations, did you, as well as this assignment? A. Yes, I did.

(Testimony of Harry Green.)

Q. Did you have a case load like Mr. Heppner had of 100 to 150 cases?

A. In 1953, no, I don't remember the number of cases at all.

(Jury admonished and morning recess taken at 11:00 a.m.)

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

MR. GREEN

resumed the witness stand on further

Direct Examination

The Court: Counsel, will you please state again for the record the demand, request in connection with the witness Heppner's notes?

Mr. Avakian: Yes, your Honor. The defense would make [294] a demand at this time for the production by the government of the various memoranda, work notes, reports or similar documents which contain his notations, regarding the subject matter of his various discussions with Dr. Kelley, and Dr. Kelley's statements to him. That is a statement of the things we are demanding, your Honor. I do not know whether you want me to go further into the reasons for it.

The Court: No. The Court feels, gentlemen, inasmuch as this witness testified without refreshing his memory, that the Court will not require the government to produce the memoranda at this time. The Court is of the opinion that the defendant may

(Testimony of Harry Green.)

make this witness his own. On examination then the defendant may demand.

Mr. Avakian: Your Honor, so that the basis of my request may be clear in the record, may I restate that one of the grounds for my request is that the statements made by the defendant to the witness, Mr. Heppner, during the course of these conversations, would in my opinion come within the basic rule of the Holland case, regarding the investigation of leads given by the taxpayer, and on that basis it would be proper for us to request a showing of what leads were given.

The Court: Yes, I am familiar, as we all are, with the Holland case, and I am also familiar with the position taken by the government that net worth is [295] merely corroborative in this record. Under such conditions it is not necessary to require the record.

Mr. Brown: That is correct, your Honor. I think that the record should factually show that the Witness Heppner testified from memory and at no time did Mr. Heppner have notes in front of him, under the basic criminal law rule.

The Court: That is the statement in the record.

Mr. Maxwell: I think the record should also show that Mr. Green just finished testifying on that same proposition.

The Court: I have said if counsel for the defense desires to call the witness as his own and in the event of that examination it becomes apparent that the record should be produced, he may make the request.

(Testimony of Harry Green.)

Mr. Avakian: I assume if we do it, it is part of our case in chief?

The Court: Yes, that is right.

Mr. Avakian: I would like your Honor—I don't understand, from Mr. Maxwell's statement that the net worth approach had some sort of supposedly influence, because in his opening statement he said not that the net worth was going to be used corroborative, but rather that was going to be one of the two methods, and as I understand, they were relying on the net worth method and I think it is proper to know whether that is correct, [296] or whether their position is that the net worth if not the primary method of proof, but simply is corroborative.

Mr. Brown: We feel, your Honor, when our case is finished, if Mr. Avakian wishes to make motions along these lines, that would be the proper time, and when we are through, if we haven't accomplished what we said we were going to accomplish, but not now.

The Court: Well, counsel may make the point. I think perhaps the proper time to do that is to make the motion at the conclusion of the witnesses.

Mr. Maxwell: What about the witness Heppner?

Mr. Avakian: May he be excused, your Honor, with the understanding we will get in touch with him if we desire to call him.

(Witness excused.)

Q. Mr. Green, I believe you had stated that you were assigned the case, would you state that date again, approximately?

(Testimony of Harry Green.)

A. Some time in January in 1953.

Q. And you took no further action in the case until October, 1953, is that correct?

A. That is correct, except possibly getting an extension of the time.

Q. Did you contact the doctor, then, in October, 1953? A. I did.

Q. And where did you contact him? [297]

A. I called him from our office and made an appointment to see him at his office.

Q. What occurred at that time?

A. At that time we discussed the matter of records.

Q. Before you get into discussion of this, who was present when you visited the doctor?

A. Just the doctor and myself.

Q. Do you recall the date?

A. I believe it was October 5, 1953.

Q. What was said at that time?

A. The doctor and I had a general discussion regarding the records that I would need in connection with the audit of the returns and the location of where the records were at that particular time. The doctor stated some of the records were in the office, the patient cards; the balance of the records he thought were at his home, but he would check on that.

Q. Then what occurred?

A. Well, the conversation—it was either on that day or the following day or the day after, that I actually picked up the records and I told the doctor

(Testimony of Harry Green.)

it was within his rights, legal rights, to refuse to let me take the records out of his office, but because of the shortage of space in which to perform the audit, I preferred to do that in our office, and he said that was perfectly agreeable.

Q. Now can you state then at that time what records did you [298] take and where did you take them from?

A. On this particular day no records were taken, that is, October 5th. The next day it is my recollection, October 6th, I picked up a number of patient cards from the doctor's office just he and I being present, and then the following day, after the doctor had so notified me, I went to their home on Bret Harte Avenue and picked the remainder of the records up from Mrs. Kelley. They consisted of check register, cancelled checks, bank statements, receipt books, various items pertaining to investment, for which a receipt was given.

Q. Do you have that receipt?

A. I have a copy.

Q. Where is the original?

A. The original was given to Mrs. Kelley at the time.

Mr. Maxwell: I will offer the receipt in evidence as plaintiff's next in order.

Mr. Lohse: Your Honor, we have no objection to the admission in evidence.

The Court: The offer will be received and marked government's Exhibit 122.

Q. Now, will you refer to Exhibit 122 and tell

(Testimony of Harry Green.)

the jury and the Court what records you took from Dr. Kelley's home?

A. These are the records I gave receipt for.

Q. Where did you secure those?

A. At the doctor's home. [299]

Q. Did you get any patient cards from Mrs. Kelley? A. No, I did not.

Q. At the doctor's home?

A. No. Receipt for bank deposit on the First National Bank of Nevada, First & Virginia Branch, Reno, for the years 1948 to 1952 inclusive; a check registry covering a period from the middle of July, 1942 to 1952, inclusive; a bank statement and cancelled checks on the same bank, First National Bank, for the period December of 1947 to December of 1952, inclusive; receipt books for the period September 26, 1951 to January 27, 1953.

Q. When you say receipt books, what do you mean? Can you make it more specific?

A. Well, the item here says receipt books, but actually it was a book the doctor used to give receipts for cash payments by various patients, and also some checks.

Q. Do these books contain original receipts or stubs or duplicate receipts, or what?

Q. These were duplicate receipts. Paid invoices for the years 1948 through 1952, inclusive; copies of Dr. and Mrs. Kelley's tax returns for the years 1948 to 1952, inclusive; the physician's account record book for 1952; a notebook covering equipment purchased and medical, physician's expenses

(Testimony of Harry Green.)

for the years 1946 through 1951; an individual dividend record sheet on stocks owned during the years 1948 to 1952, inclusive. It bears my signature.

Q. Now did you have a conversation with Mrs. Kelley at that [300] time with respect to the reason that you wanted these records?

A. You mean the reason why I wanted to take them out of the place?

Q. Yes.

A. To the best of my knowledge, I gave her the same reason I did the doctor, no room to work. Mrs. Kelley had two or three small children at the time, there was no place to work. I told her, to the best of my recollection, I preferred to perform the work at the office. She said that was very agreeable.

Q. She helped you to get the records?

A. She did, and I gave her a receipt.

Q. Did she mention she had talked to Dr. Kelley with respect to your taking the records?

A. Yes, she said the doctor said to take them.

Q. Now, you say that you picked up some patient cards from Dr. Kelley about October 5th or 6th of 1953?

A. It was October 6th.

Q. And did you, from time to time, secure other patient cards from the doctor's office?

A. I think I went back to the doctor's office one other time to obtain additional patient cards.

Q. Did you return the patient cards in your possession to the doctor after each visit?

A. I did.

Q. Now, why didn't you give a receipt for those

(Testimony of Harry Green.)

patient cards? [301]

A. For the simple reason that there were just too many of them to detail on the receipt. There were several bunches of cards, larger bunches than you see there.

Q. At the counsel table?

A. At the counsel table and to itemize each one would be a tremendous job. I explained that to the doctor, the reason for not giving a receipt.

Q. Was he agreeable to that?

A. Yes, he was.

Q. Mr. Green, did you make a search of all of the files of the Internal Revenue with respect to any documents that you might have had, or which the Internal Revenue Service might have had, which might belong to Dr. Kelley? A. I have.

Q. Was that a thorough search?

A. Very thorough.

Q. Did you find any such documents?

A. I did.

Q. What documents were those?

A. I have them in my possession right now, three patient cards of the doctor's.

Q. Might I have them? Can you tell me, Mr. Green, where these additional cards were located?

A. I couldn't say the exact folder, but they were in one of our work paper files, which had been put aside for the time being. [302] Those were each filed individually.

Mr. Maxwell: I think counsel will stipulate that these patient cards are the ones handed to them

(Testimony of Harry Green.)

in chambers and they were willing to accept them at that time. I believe that was Thursday, March 29th.

Mr. Avakian: Your Honor, I state this, that Mr. Brown last Thursday offered certain cards to me in your chambers and I declined to take them except in the presence of the jury, in view of the accusation made that Dr. Kelley had lost or destroyed records. I did not examine the cards then. I will take counsel's word that these are the same ones.

Mr. Brown: You will also stipulate the reason you did not take them, you wanted to take them in front of the jury?

Mr. Avakian: I just stated that, in view of statements you had made.

Mr. Brown: Check them over.

Mr. Avakian: May the record show counsel has handed me the following cards: Florence Case, Katherine Ramsdell, and Virginia Berg.

Mr. Maxwell: Does counsel care to put in the record those cards, sir?

Mr. Avakian: Your Honor, the problem there is that they contain confidential information as between physician and patient. I do not like to have them marked for identification because then they are available to anyone who wants to look at [303] them.

Mr. Brown: We will withdraw the offer. That is correct, that is privileged information.

Q. Now, Mr. Green, did you find any other

(Testimony of Harry Green.)

records or documents, or anything else, belonging to Dr. Kelley in the Internal Revenue file?

A. No, sir, I did not.

Q. Now, did you ever return the records summarized in that receipt, government's Exhibit 122, which you still have?

A. Yes, I did return them.

Q. And did you receive a receipt for those records?

A. I did.

Q. Do you have that with you?

A. Yes, I do.

Mr. Maxwell: May the record show that the witness has handed me a piece of paper. I will offer this receipt in evidence as government's exhibit next in order.

Mr. Lohse: Your Honor, we have no objection to the admission of the receipt in evidence.

The Court: The offer will be received in evidence as government's Exhibit No. 123.

Q. Now, Mr. Green, I will hand you government's Exhibit 123 and I will ask you if you had a discussion with Dr. Kelley at the time that receipt was given to you?

A. I don't recall that we had any conversation at that time. [304]

Q. What is the date?

A. The date is December 17, 1953, is the date on the letterhead receipt, and that actually was the date the documents were returned.

Q. Is there the signature of Dr. Wayne P. Kelley on that?

A. Yes, sir, there is.

Q. Was that signed in your presence?

(Testimony of Harry Green.)

A. In the presence of myself and Special Agent Black.

Q. Did you go over the items on that receipt and records you were returning?

A. Yes, sir, in great detail.

Q. Can you tell us what occurred?

A. The doctor checked over each item that we presented to him on this receipt. He checked over very carefully to make sure it was just exactly what was there.

Q. I notice there are some check marks on that piece of paper in ink. Are those the doctor's check marks?

A. To the best of my knowledge, those are his check marks, also his marks on the duplicate receipt and original.

Q. Did he go over them at the same time?

A. Yes, because that was the basis of checking, to make sure he had everything back.

Q. He went over the duplicate receipt and the original?

A. Well, he checked the duplicate receipt against the documents we were returning, and then he checked off. [305]

Q. He matched your duplicate receipt, is that correct, with the document?

A. I am not quite sure right now whether he matched a document with my duplicate receipt and then found an item and then found an item on this one for which he was receipting, or whether he used this receipt he was signing.

Q. Did he have with him the original of the re-

(Testimony of Harry Green.)

ceipt which you turned over to Mrs. Kelley?

A. I don't recall seeing it.

Q. You never saw that? A. No, sir.

Q. So they used your duplicate of that receipt and the original receipt which was in typewritten form, is that correct?

A. To the best of my knowledge, yes.

Q. The doctor didn't tell you he had lost that, did he? A. The original receipt?

Q. Yes.

A. If there was any conversation on it, I don't recall now. I know when we went over there with the records, we took this typed receipt with us.

Q. May the record show I am handing you Exhibits 11, 12, and 13, which are entitled, "Certificate of Assessment Payments," and 13 being from the office of the District Director of Internal Revenue, Syracuse, New York, and No. 11 and 12 being from the office of District Director at Reno. [306]

A. That is correct.

Q. Now, Mr. Green, did you attempt to determine the amount of cash on hand that Dr. Kelley could have had on these earlier returns on January 1, 1949? A. Yes, I did.

Q. What did you do in that respect?

A. First of all, I used the records of the Internal Revenue office, both Syracuse, New York and Reno, Nevada, to determine what taxes had been paid.

Q. Let us find out what you used in making your computations.

A. Do you want to go over that year by year?

(Testimony of Harry Green.)

Q. Yes, more or less. For what years did you have the original returns?

A. I had the original returns for the years 1942, 1943, 1946, 1947, and 1948.

Q. I will hand you plaintiff's Exhibits 1, 2, 3, 4, 5 and 6, and ask you if those are the returns to which you refer? A. Yes, these are the returns.

Q. Besides those returns, what else did you use?

A. I used the record of tax payments, income tax payments obtained from Syracuse, New York Internal Revenue office.

Q. That is exhibit what?

A. That is Exhibit 13 in that particular case. Then, as regards the years 1942 through 1945 returns, those were not available. [307]

Q. I believe you have a 1942 return up there.

A. 1942 and 1943 we had the returns; 1944 and 1945 we had no returns, so we used the records of the tax paid per the Reno Internal Revenue office, which is Exhibit 11, and for the later years we had the returns.

Q. Now, did you use anything else in making such determinations?

A. Well, I had to have the reference table, which would show the tax reference in the various years that we didn't have the returns, to determine what the income was, where there was a tax paid or where there was no tax paid.

Q. Then, Mr. Green, what does your computation show? Have you made such a computation?

A. Yes, I have.

(Testimony of Harry Green.)

Q. Is it in typewritten form or handwritten form? A. It is in my handwritten form.

Mr. Maxwell: May I see it? I will ask the two pieces of paper be marked for identification.

The Court: The offer will be marked Exhibit 124(a).

Mr. Maxwell: May it please the Court, I believe examination of this matter will take 15 or 20 minutes. It might be an appropriate time to recess.

Mr. Avakian: Your Honor, before we recess, I wanted to answer inquiry Mr. Maxwell made with reference to these three cards. He asked me if I would stipulate——

Mr. Maxwell: I made no such request, counsel. I asked [308] counsel if he would care to read the cards in the record.

Mr. Avakian: I would like to state examination of the cards show the card of Virginia Berg has various dates and months without a year on it, your Honor.

Mr. Maxwell: You can't determine what year it is, counsel?

Mr. Avakian: Not from examination of the card. As to Katherine Ramsdell, the card has data on it with regard to treatments, but it likewise does not show the date.

Mr. Maxwell: Does it show payment?

Mr. Avakian: It shows \$10, but I can't tell payment or charge from the card. With reference to Mrs. Florence Case, the card shows it is in 1948 and 1949, including a payment of \$270 on January 10,

(Testimony of Harry Green.)

1949 and stapled to the card is a letter from the Bank of America, San Francisco, dated January 7, 1949, reciting that enclosed with the letter is cashier's check for \$270, representing the amount due on account of Florence Case.

Mr. Brown: I think that should be stricken. They are reading from the patient card.

The Court: Gentlemen, I just can't understand all the ceremony of these cards.

Mr. Avakian: There was an inquiry as to whether we would care to recite the dates, and I am giving it.

(Jury admonished and noon recess taken at 12:00 o'clock.) [309]

Afternoon Session—April 3, 1956, 1:30 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MR. GREEN

resumes the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Green, you now have in front of you plaintiff's Exhibit 124(a) for identification. Now I believe you previously—tell us what Exhibit 124(a) is.

A. Briefly, it is merely a computation to show income tax returns that were filed for taxes paid and the computation of income made from the tax, what the doctor could have accumulated in the way of assets during the years 1932 through 1948.

Q. Now, for the year 1932, I believe you have

(Testimony of Harry Green.)

form 899 up there, the certificates of assessments, Exhibits 11, 12, and 13 you also had the income tax returns, didn't you, for the years 1942 to 1948?

A. That is correct.

Mr. Avakian: No, Mr. Green testified he didn't have them for those five years.

Mr. Maxwell: I will accept counsel's correction.

Q. Mr. Green, I will give you all these income tax returns, exhibits 1 through 10. Now for the year 1932, as I recall previous testimony here, the doctor was in medical school at that time, is that correct? Do you recall testimony to that effect?

A. That is my recollection, yes. [310]

Q. For that year, do the records which you have in front of you show whether or not a return was filed?

Mr. Avakian: Just a moment, your Honor, I submit the record speaks for itself. The witness should not interpret it. He didn't prepare it.

The Court: I don't think the question asked for his interpretation, counsel.

Mr. Avakian: I may have misunderstood, but I would like the witness to be cautioned not to interpret what is in the document, because I think there is room for interpretation, what he is being asked about.

Q. Do the records indicate that any return was filed by Dr. Wayne P. Kelley for the year 1932?

Mr. Avakian: I submit that calls for the witness's interpretation as to what the record indicates. The document simply recites on a form

(Testimony of Harry Green.)

which is supposed to set forth information in the Collector's office, the words "No record."

Mr. Maxwell: I think counsel can argue at the end of the case. He is certainly entitled to cross examination and I think he is going to be given opportunity to cross examine this witness and I suppose that the witness will be permitted to answer.

The Court: Objection overruled. The witness may answer.

A. The record discloses for the year 1932 no returns filed. [311]

Q. And what exhibit are you referring to?

A. Referring to Exhibit 13.

Q. And what word was shown on there in respect to 1932 records of the Director of Internal Revenue for the District of Syracuse?

A. No record.

Q. What does that mean, in customary usage, on form 899, Certificate of Assessment?

Mr. Avakian: Objected to as calling for conclusion of the witness on a matter he is not qualified and in respect to a document not issued in this office and no foundation laid as to any matters called for by that question.

Mr. Maxwell: May it please the Court, this witness, I understood his testimony in the record, that he has been an employee of the Internal Revenue Service for over ten years.

Mr. Avakian: Not in Syracuse. He had nothing to do with the preparation.

(Testimony of Harry Green.)

Mr. Maxwell: And he certainly is qualified to testify as to usual useage of the Internal Revenue forms.

The Court: Objection overruled, answer.

Q. What do the word, "No record" mean in connection with form 899, Certificate of Assessment Payment?

A. It means that the Internal Revenue office for the district had searched their files and had found no record of a return being filed for that date.

Q. Now, did you determine what amount could Dr. Wayne P. Kelley [312] have earned during the year 1932 without filing a return? In other words, what was the maximum amount he could have earned without being required by law to file a return for the year 1932? A. \$2900.

Mr. Maxwell: With the Court's permission, I am going to put these amounts on the blackboard.

Q. And would there be any other possible credit in that year that has been brought to your attention, Mr. Green? A. No, sir.

Q. So what is the maximum amount that he could have made for the year 1932 without being required to file a return? A. \$2900.

Q. Now, did you make a similar computation as to the year 1933? A. I did.

Q. What did you do in making your computation?

A. I checked against the Internal Revenue records, as represented by Exhibit 13, and found that there too no return had been filed.

(Testimony of Harry Green.)

Q. And what elements did you take into account in computing the maximum amount that he could have made for that year, without being required to file a return?

A. I took the net income requirement, which in this particular year happened to be the married requirement, plus a man with one child. [313]

Q. How much would that maximum amount be?

A. \$2900.

Q. And you did the same thing for 1934?

A. I did.

Q. Would you explain the same way as you did for 1933?

A. In this particular year, 1934, I referred to Exhibit 13, he returned one for that year and it was a non-taxable return, which means no tax due and payable, on the return.

Q. Then in 1932 the letter "N. R.", no record, and the same thing in 1933 and 1934 was a non-taxable return, is that right?

A. That is correct.

Q. All right, put down "N. T." Now what would be the maximum amount of income that could have been reported on that return to have it still within the non-taxable range?

A. Going back to the amount for two children, \$3300.

Q. That would be two children?

A. That is correct.

Q. Did you do the same thing as to 1935?

(Testimony of Harry Green.)

A. I did. On that year, as in 1934, a non-taxable return was filed.

Q. What would be the maximum amount of income that could have been obtained on that return and still have been non-taxable?

A. The second part of 1934 that figure should be \$2900. It is based on one child.

Q. One child? [314]

A. Yes, the information I was giving, the year 1935, the figure would be \$3300, based on two children.

Q. How about 1936?

A. For the year 1936, referring again to Exhibit 13, the taxpayer did file a return and he paid tax in the amount of \$13.78.

Q. And did you, taking into effect the various exemptions, did you compute the amount of income that would be for \$13.78 would be tax upon?

A. Yes, I did, and the figure I came up with, allowance for two children, was \$3644.50.

Q. Now what about 1937?

A. 1937 was the same situation as in 1935. There was a return filed but it was a non-taxable return. I allowed the doctor the marital exemption and the credit for two children, as in the previous year, and the figure was \$3300.

Q. Now these figures all refer to net income, is that correct?

A. That is correct. During those years there was a net income requirement rather than gross income requirement in filing taxes.

(Testimony of Harry Green.)

Q. How about 1938?

A. 1938 had a non-taxable return. Checking into it, after applicable allowance for being married and having two children, the amount was \$3300.

Q. Now 1939.

A. Exactly the same as 1938, non-taxable return being filed. [315]

Q. 1940?

A. In 1940 a non-taxable return was also filed. In that year there was a gross income requirement, rather than a net income requirement, but in computing this figure, I took into effect the marital exemption and amount for two children and figured \$2800.

Q. Was that gross income?

A. That would be—not knowing what amount of net income the doctor reported, the only thing I could do was to compute the maximum amount of income he could earn without having to pay any tax, and that would be \$2800.

Q. What about the year 1941?

A. For the year 1941 there was a return filed, on which a tax of \$2.08 was paid. A computation was then made of the income tax by taking into effect the deduction of a man being married and having two children, and the net income figure would be \$2320.80.

Q. What about 1942?

A. Exhibit 11, from the Reno Internal Revenue office, shows that a non-taxable return was filed. We also have the original return in evidence.

(Testimony of Harry Green.)

Q. I think it is right in front of you.

A. That's right.

Q. And that would be a non-taxable return, did you say? A. That is correct.

Q. And what is the amount of net income shown by that return? [316]

A. The amount of net income is \$525.39, but to that I added the \$1500 excluded for army service, so the actual figure would be \$2,025.39.

Q. Now for the year 1943?

A. The year 1943 is in evidence here as Exhibit No. 1. That discloses a net income figure of \$167.00, no tax paid. However, in computing the figure that I used here on this computation to allow the doctor the maximum income that could be obtained by the government return and made a computation here which showed a total income of \$12,167.

Q. You say that was a non-taxable return year?

A. That is correct.

Q. Now did that return show that he made that much money?

A. The return shows that he had that much in funds available that year.

Q. Now for the year 1944?

A. The year 1944, the record of the Reno Internal Revenue office disclosed that a tax of \$108 was paid. For that year I had to again reconstruct the net income available to the doctor, based on the tax, by using the applicable tax rate, plus marital exemption and allowing him credit for two children, and the figure then is \$4,124.99.

Q. How about the year 1943? I note that is 12

(Testimony of Harry Green.)

thousand. Do you have any explanation for that?

A. Yes, I do. In that particular year the doctor sold his house [317] in New York, I believe, and he received, according to the tax return, \$9,240. I gave him credit for the full amount of \$9,240——

Q. As having been received?

A. That's right; plus the other items on the return that he had reported.

Q. How much net income did that return show for that year? A. \$167.

Q. All right, 1945?

A. The records disclose that the return for 1945 was filed and tax of \$93.20 was paid. Recalculating the income for that year from the tax that was paid, allowing the doctor marital status, plus two children, it has resulted in a net income figure of \$4,049.99.

Q. All right, 1946?

A. The year 1946 separate returns were filed by the doctor and Mrs. Lois Kelley, his wife. The total tax paid for that year was \$854.

Q. And what would be the total net income available to Dr. Kelley?

A. I used my audit for the year 1945. I also gave the doctor credit for \$1500 military exemption. The total income for 1946 is \$6,089.57.

Q. Now 1947?

A. The original returns, which are in evidence here, show a [318] separate return was filed by husband and wife, Lois and Wayne P. Kelley, and total tax paid of \$1,586.00. Total income reported, \$9,964.66.

(Testimony of Harry Green.)

Q. And 1948?

A. The year 1948 a joint return was filed by Dr. and Lois K. Kelley. Total tax paid was \$1,743; total income was \$12,131.33.

Q. Now you have totals, Mr. Green, for this particular year period 1932 to 1948? A. I do.

Q. All right, what are your totals?

A. Total for that, that you have on the black-board.

Q. That is income amounts, is that correct?

A. That's right, \$80,818.23.

Q. And total amount of tax paid?

A. No, sir, I didn't make a total of that.

Q. Take the figures here and add them up. Just come down here and add them up.

A. I think it would be easier just to do it from my work sheet, if I may.

Q. All right.

A. I have a total figure here of \$4,292.06.

Q. That \$4,292.06 would be required of 80 thousand? A. That is correct.

Q. So in other words, to find what monies were available he had, we subtract 4,292.06 from 80,818.23? [319] A. That is correct.

Q. Because that amount was paid into the government?

A. That is correct. Now there is an additional amount here which should be added to the funds available.

Q. What is that?

A. That is during the doctor's military service there was subsistence and rental allowance that was

(Testimony of Harry Green.)

paid to him as an army officer, which was not taxable under the law. Now I have a figure totalling that.

Q. Now have you excluded from any of these amounts the amount it cost the doctor to live during the years 1932 to 1948?

A. No, sir, I have not charged him with any.

Q. In other words, this is as though he never spent any money for groceries or clothes or anything like that?

A. That is right.

Q. Add that subsistence allowance in to, what was that?

A. The amount is \$5,742.

Q. We did add that to the 80 thousand?

A. That is correct.

Q. And then subtract \$4,292.06?

A. That's correct.

Q. What is the answer you finally come out?

A. The net figure is \$82,268.18.

Q. \$82,268.17?

A. Yes, sir. [320]

Q. Now, Mr. Green, in the course of your investigation, did you run across any information with respect to stock rights and shares held by the doctor during the years 1949 to 1952 in the Southern Natural Gas Company?

A. Yes, I did.

Q. Where did you run across that information, sir?

A. In the doctor's record of stock list sheet turned over to me, with the notation that on February 1, 1951, they had paid \$165, plus \$3 for the rights to acquire this stock.

Q. And do his records still show that he owned

(Testimony of Harry Green.)

that stock at the end of 1952? A. Yes, sir.

Q. Did his income tax of 1951-1952 reflect the sale of that stock?

A. Without looking at it right now, I would say no. I am not positive. I do not recall.

Q. Now, did you, in going over the doctor's records, find information with respect to monies he had spent for equipment during the years 1949 to 1952?

A. The doctor had an equipment book, in which these various items were listed, where he had purchased various items of professional equipment and I made a test check against those figures with the items on the tax returns and found them to be approximately the same.

Q. Now, you have heard some testimony here undoubtedly about an [321] airplane. Mr. Green, did you find on the doctor's records information with respect to the purchase of an airplane?

A. I found information pertaining to one airplane. The information is under airplane he had previously bought.

Q. What did you find?

A. I find that on June 11, 1948, by check No. 2093, which was memo from the doctor's registry, he had spent five thousand dollars for an airplane. There is a notation in his equipment book that he was allowed \$4500 trade-in on another airplane that he previously owned, making a total figure of \$5,500.

Q. Is there a reference on the income tax returns to the total amount for airplanes 1949-1952?

(Testimony of Harry Green.)

A. To the best of my recollection, the airplane is reported on the 1951 returns.

Q. What did he use for figures on the return?

A. You are talking about the year 1949 and 1950?

Q. Yes.

A. In the year 1949 it shows a value of 8 thousand dollars for an airplane, acquired in 1949, according to the returns. Depreciation was claimed on the airplane. For the year 1950 the 8 thousand dollar figure appears again in the depreciation schedule for airplane. In the year 1951 the value of \$9500 appears in the depreciation schedule of the airplane, and the year 1952 the \$9500 again appears on the depreciation schedule.

Q. And is that the same airplane all the way through? [322]

A. Are you referring to the 8 thousand?

Q. All the way through?

A. The 9500 airplane would be the same one all the way through, that is right. The 8 thousand dollar figure, according to the examination of the figures, was erroneous. It should have been 9500.

Q. Wasn't there something in there about sale of an airplane? Just tell me what the returns show.

A. I think there was in one of these years, yes; in the year 1948, the doctor claimed a loss on the sale of an airplane, stated its cost was \$9500 and sale price was \$8,000. We determined what really happened, there was refund given on the old airplane towards a new airplane.

Q. Did you talk to the doctor about that?

(Testimony of Harry Green.)

A. I think so—I am not sure about that. We conducted most of the questioning on that point with Mr. Lyons, the doctor's accountant.

Q. Now, Mr. Green, in going through the doctor's records, did you find information as to the purchase of furniture and making of improvements to his home? A. Yes, sir, I did.

Q. Will you tell us what your investigation of the doctor's records disclosed in that respect?

A. May I refer to my notes?

Q. Yes, certainly. [323]

A. The first entry is the matter of furniture for the home. An examination was made of the doctor's check registry to determine what items were paid by check. In addition, the records of the Home Furniture Company, where the things were purchased in the doctor's name, are now in evidence, were also examined and totalled and I arrived at the various figures in that examination.

Q. Will you please give me what you found with respect then to the furniture?

A. At the end of the year 1948 the amount of furniture owned was \$2,624.29. The figure for the year 1949 is exactly the same. The year 1950 there were a few small purchases that increased this amount of furniture owned to \$2,827.91. At the end of 1951 the figure was \$2,907.74, and the year 1952 shows the same, \$2,097.74. As regards the home improvements, those were obtained by analyzing the doctor's check registry and I have various figures for this here.

(Testimony of Harry Green.)

Q. Well, can you tell us what improvements were made and the amounts at the end of each year, 1949 to 1952?

A. Yes, I can. For the year 1949 I couldn't find any record of any home improvements from the check registry. The year 1950 there was \$703.15 expended for improving his home. That is made up of four items. Do you wish me to read those?

Q. Yes, please.

A. First item was electric sink, \$367.50; sink installation, [324] \$77.72, tile, \$69.97, labor, \$187.96. In 1951 \$310.00 was expended for a basement bathroom and the labor involved, total, \$382.72, making a total of expenditure that year of \$692.72. That, plus the improvements in 1950, made a total amount at the end of 1951 of \$1,395.87. In the year 1952 nothing could be found to show any further improvements. I have the figure of \$1,395.87.

Q. Now, Mr. Green, in addition to these items that you have just testified to, did you also make an attempt to determine what life insurance premiums had been paid by the doctor during the years in question?

A. I did, based on the check registry. Excluded from any figures I have are certain other personal items.

Q. I wonder if you tell us what conclusion you arrived at in connection with these figures.

A. I am sorry?

Q. Could you tell us how much he paid in the way of insurance premiums and whatever items you

(Testimony of Harry Green.)

have added in there, if you haven't those separated?

A. I don't really have them separated. I have that placed in one category, which is financial personal things and other personal expenses, exclusive of food and clothing and rent.

Q. How much did you find to have been spent under this category?

A. For the year 1949, \$787.01; in the year 1950, \$630.93 was [325] expended; in the year 1951, \$845.26 was expended; in the year 1952 total was \$936.41. A portion of that was child support and maintenance.

Q. During what years?

A. During the years 1950-52.

Q. Do you have any information as to the exact amount of those child support payments during the years 1950-1952?

A. I believe I do. During the year 1950 there was \$350 paid out of the check registry and additional \$3000 back child support settlement. That was not paid by check. In the year 1951 and 1952——

Q. Just a moment, Mr. Green, before you go to 1951 and 1952.

Mr. Maxwell: I would like to offer in evidence, as government's next in order, document entitled "Satisfaction of Judgment" in the case of Elsbeth Frances Kelley (Moore), plaintiff, vs. Wayne Plumbley Kelley, defendant, filed May 16, 1950, certified by the clerk of the court.

(Testimony of Harry Green.)

Mr. Lohse: Your Honor, we have no objection to the admission.

The Court: The offer will be received as government's Exhibit 125.

Mr. Maxwell: I would like to read this document to the jury at this time, if the Court please.

The Court: You may.

Mr. Maxwell: (Reads): [326]

"No. 126,192. Dept. 1. James D. Finch, Reno, Nevada, Attorney for Plaintiff.

"In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

"Elsbeth Frances Kelley (Moore) Plaintiff, vs. Wayne Plumbley Kelley, Defendant.

"Filed: May 16, 1:13 p.m., '50. E. H. Beemer, Clerk. By H. K. Brown, Deputy.

"Satisfaction of Judgment.

"For and in consideration of the sum of Three Thousand Dollars, to me in hand paid by Wayne Plumbley Kelley, the Defendant named in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, in the above-entitled action for the sum of Three Thousand Dollars in favor of the plaintiff herein and against the said defendant herein, and I hereby authorize the Clerk of said Court to enter satisfaction of record of said judgment in the amount of said Three Thousand Dollars, the remaining por-

(Testimony of Harry Green.)

tion of said judgment as to the future support of the two minor children therein not being affected by said satisfaction for the sum of Three Thousand Dollars. [327]

“In Witness Whereof, I have hereunto set my hand this 16th day of May, A.D., 1950.

/s/ JAMES D. FINCH,
Attorney for Plaintiff.”

With the Court's permission, I will not read the certification.

Mr. Avakian: We would appreciate that.

Mr. Maxwell: You want it read?

Mr. Avakian: We would appreciate it if you skip it.

Q. Now will you go back to your testimony as to child support during the year 1950, so that we get a picture of 1950, 1951, 1952.

A. In addition to the three thousand dollars payment by the doctor, there was, during the year 1950, \$350 paid by Dr. Kelley to Elsbeth Kelley.

Q. By check?

A. By check. In the years 1951 and 1952, also by check, was the amount of \$600 each year. This also was paid to Elsbeth Kelley.

Q. Which ones of those amounts are included in any items of life insurance premiums and other personal items, except food and clothing?

A. \$350 in the year 1950; this is not food and clothing.

Q. Inclusive is what I thought I said.

(Testimony of Harry Green.)

A. \$350 the year 1950; \$600 in the year 1951; \$600 in the year [328] 1952. May I just check my figures again, just a moment?

Q. Certainly.

A. I am sorry. The child support payments are not in those amounts. They are for living expenses.

Q. Now, Mr. Green, did you find any information with respect to food and clothing and other personal living expenses of Dr. Kelley?

A. The analysis of the check register, the only record we had to go by, showed that during the year 1952 we find the items expended by check for food and clothing; 1949, 1950, 1951——

Q. How much did you find for 1952?

A. \$299.01.

Q. Now did you ever, at any time, ask Dr. Kelley for such information? A. I did not.

Q. Mr. Green, did you find any information in the doctor's records with respect to some Marchan Valve stock?

A. Yes, that was in the doctor's investment record.

Q. And what did you find as to purchases of that stock during the years 1949 to 1952?

A. I do not have the figures how the acquisition was or the cost. It was still on hand at the end of 1952. My recollection is it was 200 acquired in 1948 or 1949. I do not have the information here.

Q. I believe you said, Mr. Green, that you had the check register. [329] Did you also have the cancelled checks?

(Testimony of Harry Green.)

A. I believe the receipt shows that we did have the cancelled checks.

Q. While you had the records, did you attempt to determine the outstanding checks at the end of each year, 1948 to 1952?

A. No sir, I do not believe I did.

Q. Did you subsequently receive information with respect to the outstanding checks from one of Dr. Kelley's representatives?

A. Yes, I did.

Q. Who was that?

A. Mr. Lyon furnished Mr. Black and myself with certain reconciliation bank accounts, showing outstanding checks.

Q. And can you state that figures were given to you?

A. I believe I have them here. Yes, I do have them, from Mr. Lyon.

Q. What information did he give you with respect to outstanding check for the years 1948 to 1952? Will you give us the figures that he gave to you?

A. This relates to the checking account at the First National Bank of Nevada, First & Virginia Branch, in Reno. This shows that the balance at the end of 1948 was \$155.09.

Q. What do you mean, balance? That is adjusted balance in the bank account?

A. That is the adjusted balance, after deducting the outstanding checks. [330]

(Testimony of Harry Green.)

Q. What bank would that be?

A. First National Bank of Nevada.

Q. Showing you Exhibit 25, which has been placed in evidence, ledger sheets of the account of Wayne P. Kelley, M.D., or Lois Kays Kelley, First & Virginia Branch, First National Bank of Nevada, that is the account to which you refer?

A. That is correct.

Q. What is the balance shown on the bank record at the end of the year 1948? A. \$262.25.

Q. Now you say the adjusted balance for that account on that date is \$155.09?

A. That is right.

Q. Why is that?

A. There were three outstanding checks that had not cleared the bank at that date, totalling \$107.16.

Q. Explain that to me a little bit further. You mean that Dr. Kelley had previously written these checks, before the end of the year 1948?

A. That is correct.

Q. And they had not been deposited or tendered, given to the bank for collection yet?

A. That is correct.

Q. At the end of the year 1948?

A. At the end of the year 1948. [331]

Q. They came in later on?

A. They came in apparently after the first of the year.

Q. So you have knocked the balance by the amount of those checks that were outstanding, is that right? A. Yes.

(Testimony of Harry Green.)

Q. And for the year 1949 account you did the same thing? A. Yes.

Q. Which made the amount of corrected balance at the end of the year 1949 and amount of outstanding checks——

A. Shall I refer to the ledger card or Mr. Lyon's statement?

Q. Both of them.

A. These cards are a little mixed up.

Q. Well, why don't you use Mr. Lyon's statement? I am sure that is right.

A. At the end of the year 1949 the bank balance was \$709.02. There were outstanding checks as at the end of 1949 of \$379.07, leaving a reconciled bank balance of \$329.95.

Q. At the end of the year 1950?

A. At the end of the year 1950 the bank ledger card shows a balance of \$989.05. Subtracted from that are outstanding checks totalling \$217.30, making a balance at the end of 1950, corrected, of \$771.75.

Q. The subtraction does not make it quite right, Mr. Green. Will you go over those figures again?

A. \$989.17. [332]

Q. I thought you said \$207.30—it is \$217.30?

A. Right.

Q. Will you give us the adjusted balance again at the end of the year 1950? A. \$771.75.

Q. And 1951?

A. The bank balance shows a figure of \$10,170.67. There were outstanding checks totalling \$69

(Testimony of Harry Green.)

that year, leaving a reconciled balance of \$10,101.67.

Q. And 1952?

A. The bank showed balance of \$1244.17; outstanding checks totalled \$139.16, leaving a reconciled balance of \$1105.01.

Q. Mr. Green, I forgot to ask you, did you, while you were examining the patient cards of Dr. Kelley, did you ever happen to run across your patient card?

A. No sir, I did not.

Q. Did you look for it? A. Yes sir.

Q. Now, Mr. Green, I wonder if you made an investigation to determine, at least in part, items of cash or currency which were available to the defendant for expenditures during the years 1949 to 1952? A. Yes sir, I did.

Q. What did you find in that respect? What cash did you find had been received and was available during the year 1949? [333]

A. During the year the doctor had available, in unidentified cash receipts, not in bank account, \$2231. In addition he also had available checks that were not cashed, reflected in business receipts.

Q. You mean reported on the return?

A. That is correct, of \$3,794.25. The same year there were two dividends from the Southern Natural Gas Company totalling \$6,000, which was reported on the tax return but could not be found on the bank account.

Q. You mean could not be found on the bank deposits?

(Testimony of Harry Green.)

A. That is right. That was considered additional. During the same year a thousand dollar bond was cashed, No. M393508D, which did not appear on the bank deposits. Therefore, the thousand dollars was given as a source of funds. That is all for the year 1949.

Q. Did you find any items that might reflect any cash available to Dr. Kelley for expenditure during 1950?

A. Nothing at the moment which I recollect.

Mr. Avakian: I am sorry, I didn't get the question.

Mr. Maxwell: What information did he have in the same respect for the year 1950?

A. I am sorry, I said 1949. For 1950 the doctor also had cash available from the following sources: cash that was not deposited in bank account or reflected in tax returns, totalling \$2271. In addition there were checks that were cashed in that [334] year, also reflected on tax return, not in bank deposits, totalling \$3536.00, and in that year, 1950, the doctor cashed a thousand dollar endowment policy, which could not be found in either the bank deposits or assets and considered additional sum in cash.

Q. How did you find out about the thousand dollars, Mr. Green?

A. He hadn't received a thousand dollars. The difference between the first cost and the thousand dollars was reported as income on the tax return.

Q. Are you still in the year 1950?

(Testimony of Harry Green.)

A. Yes. That is all the sources available. There is an expenditure item.

Q. What is that?

A. In the savings account No. 5192, Security Bank of Reno, on February 15, 1950, there is a deposit of \$800 in currency, which would reduce the cash available for that year.

Q. What about the year 1951?

A. In 1951 the doctor had available to him cash on deposit, but reported on tax return, \$12,811.95. There were certain checks that were cashed that year which were reported receipts on the tax return, totalling \$654.50. That is all the source for that year.

Q. 1952?

A. The year 1952 the receipt book of the doctor's disclosed there was \$12,350.50, which was primarily cash received or for [335] checks that were cashed. This figure was not in the bank deposits or in reported receipts on the tax return. Therefore, it is considered a source of cash for the doctor. And in addition there were certain unidentified cash items reflected in the doctor's duplicate bank deposit slips which were in the reported receipts on the return, the net being \$203. That's all.

(Jury admonished and recess taken at 2:50 p.m.)

3:05 P.M.

Defendant present with counsel. Presence of jury stipulated.

MR. GREEN

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): I asked you with reference to Marchan Valve stock. A. Yes sir.

Q. Did you check your records and find out when it was purchased and the amount?

A. The date was August 24, 1929 and the amount was \$200.

Q. Did you find any information on the doctor's records with respect to deductible expenses?

A. Yes sir, I did.

Q. What did you find in that respect for the years involving 1949 to 1952?

A. For the year 1949, I would like to give it broken down in various categories.

Q. Please do. [336]

A. The year 1949 there were \$68.50 contributions. Medical expense was \$84.92. I did not find in the check register the real estate tax paid on the home. For the year 1950, contributions totalled \$237; medical expense, personal medical expense, totalled \$83.39; real estate taxes totalled \$232. For the year 1951, contributions totalled \$407; personal medical expenses totalled \$159.15; real estate taxes and other personal taxes totalled \$326. For the year 1952, contributions totalled \$523; personal medical expenses totalled \$101.45; real estate taxes totalled \$282.25. These were all taken from analysis of the doctor's check register.

Q. Were those amounts included by you in the

(Testimony of Harry Green.)

amounts of insurance premiums and other living expenses, exclusive of food and clothing?

A. No sir, they were not.

Q. Now I wonder if you can tell me in what year these amounts, specified deductions on page 3 of the return, were claimed and what year Dr. Kelley claimed the standard deductions? You have the returns to refer to, do you not?

A. Yes, I do. In the year 1949 the doctor did claim specific deductions. Do you wish me to read what that was?

Q. Yes, please do.

A. In 1949 the doctor claimed \$386 contributions, of which I found \$145 in the check book. Still in the same year I did not find any item for medical expenses, but the amount on the tax [337] return was \$457.65.

Q. Now, Mr. Green, my notes may be wrong, but I thought you told me you found \$68.50 for contributions and \$84.92 for medical expenses, for the year 1949?

A. I beg your pardon, I was wrong there. The year 1949 the contributions I found in the check register was \$68.50, the medical expense was \$84.92.

Q. What was on the return for that year, 1949?

A. \$386 for contributions and \$457.75 for medical deduction.

Q. Was there anything else on page 3 deductions on the return of 1949?

A. No sir, there was not. In 1950 the doctor claimed the thousand dollar standard deduction; in

(Testimony of Harry Green.)

1951 he also claimed the thousand dollar standard deduction, and likewise in 1952.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mr. Green, I believe you testified yesterday afternoon, in explanation of your commencement of this investigation, that in May of 1951 you gave Dr. Kelley three of your personal checks, in amounts of \$5, \$20, and \$10, and that when they came back to you from your bank, you noticed that they had been cashed rather than deposited. Do you recall that testimony?

A. Yes sir.

Q. In explanation of that, before your own checks were presented, you referred to some other checks in the exhibit here [338] and evidence here and referred to a teller's stamp on the face of the check as indicative of the fact that the check had been cashed rather than deposited, do you recall that?

A. I do.

Q. And the significant feature was that at the bottom of the teller's stamp there were the figures "111," is that right?

A. I said that that was not always indicative of the cashed stamp; sometimes the "111" was put on and sometimes it was not.

Q. Do you know, from your examination, how many checks that—I believe it was the First National Bank of Nevada—that their practice, whether they always followed it or not, that their practice

(Testimony of Harry Green.)

is to use a stamp with "111" on the bottom, designating checks that have not been deposited?

A. They use that stamp or they use it, this stamp, without "111." It just depends on the clerk.

Q. What do they use when the check is deposited?

A. They don't do anything on the face of the check.

Q. They put no stamp on at all?

A. There is a clearing stamp, on the bottom of the check to be deposited.

Q. You are sure that "111" is the distinguishing feature to distinguish between checks that are cashed and checks that are deposited?

A. All I can say to that, Mr. Avakian, is that as a general rule they use "111" to show the cashed check, but quite often, I [339] believe even in my own checks, that "111" does not appear.

Q. In order that the jury may get an idea what the witness and I are talking about, your Honor, I would like to reproduce, with apologies, if I may, the nature of this stamp. Can you see this from there, Mr. Green? A. Yes.

(Counsel draws on blackboard.)

Q. That in general is the shape of the stamp and type of figures put on, is that correct?

A. That is correct.

Q. Do you know what the number two means?

A. I am not sure of that. One of those symbols there means the particular teller's number, which I am not sure.

(Testimony of Harry Green.)

Q. To refresh your recollection, I suggest that the top figure No. 2 refers to the branch of the bank, the middle figure refers to the clearing house number, the bottom figure refers to the particular teller.

A. The bottom being the teller, I am not sure.

Q. And when the "111" figure is used — this stamp has the figure "111" underneath it, is that correct?

A. That is correct.

Q. And the custom is to use this figure "111" to designate checks which were cashed?

Mr. Maxwell: That has been asked and answered three times. [340]

Q. I am going to show you your three checks issued to Dr. Kelley, which are in evidence, No. 119, the first on May 2nd for \$5, the second on May 5th for \$20, and the third on May 17th for \$10. Will you tell me which of those checks has the "111" underneath the stamp?

A. The last named check.

Q. And aside from that one, the first two do not have the "111," is that right?

A. That is correct.

Q. When you received these checks, did you receive them at one time from the bank, in one statement?

A. Yes, I did, because they all cleared during the month of May.

Q. And after examining these three checks, then, you decided that you wanted to have a look at Dr. Kelley's returns, is that correct?

(Testimony of Harry Green.)

A. That is right.

Q. How soon did you do that?

A. Well, it would be difficult to say exactly, in terms of days. Some time over a period, I would say, a month or two months.

Q. In other words, it would have been June or July, 1951? A. Possibly July.

Q. Just what did you do in that connection, will you tell us?

A. To the best of my recollection, I went over to the [341] Collector's office in Reno, which at that time was separate from our office, in the Clay Peters Building, and they kept the returns there. I wanted to look at one or two of the doctor's returns. I don't remember now whether I wanted to look at 1949, 1950 or 1948, it was one of them, and in that connection I found one of those returns, I believe 1949, was already under an office audit or examination by the office, in the safe of the former collector's office.

Q. At that time, Mr. Green, was the Internal Revenue Office, of which you were a member, independent from the office of the Internal Revenue Collector? A. Yes, we were.

Q. The collector of the Internal Revenue in the State of Nevada had no jurisdiction over you as an agent, is that right? A. That is correct.

Q. And your status as an agent placed you actually in the branch of the Bureau of Internal Revenue, which had its main office in San Francisco? A. That is correct.

(Testimony of Harry Green.)

Q. And that included the northern part of California, as well as Nevada? A. Yes.

Q. And perhaps other areas also?

A. Northern California and Nevada.

Q. At that time were there other agents as deputy collectors [342] located in the office of the Collector of Internal Revenue in Reno, who conducted examinations of tax returns?

A. Yes, there were.

Q. And it was that type of examination for which Dr. Kelley's return had been scheduled when you made inquiry about it, I mean examination by a deputy collector?

A. As I recall, it wasn't what we call a deputy collector, more an office auditor.

Q. I believe you said there was some question involving cost of deduction of airplane expenses?

A. That is right.

Q. And normally would that have meant that the deputy collector had gone through on the investigation, would have gotten in touch with Dr. Kelley and asked him some questions about his airplane deductions? A. Yes, that's correct.

Q. So that he wouldn't have done his work just in the office; he would actually have contacted the taxpayer, would he not?

A. He would have him probably in the office, either by phone or correspondence, or have the doctor come in personally.

Q. Didn't deputy collectors go out on calls and check records? A. Not this particular one.

(Testimony of Harry Green.)

Q. They don't do this, they stay in the office? I don't understand your answer.

A. In this particular case, this woman did her work in the [343] office. She didn't go out on cases.

Q. You made the request to have Dr. Kelley's return, or returns, assigned to the Internal Revenue Agents office in San Francisco for investigation, if I understood you correctly, is that right?

A. I didn't make the request; I suggested such an action be done.

Q. To whom did you make that suggestion?

A. To the office auditor who had the doctor's returns at the time.

Q. Was that actually done? A. It was.

Q. And did you do anything further in connection with that, after you made your suggestion?

A. Of what period of time are you talking?

Q. The period between then and the time the returns were sent into the Internal Revenue Agents office in Reno, did you do anything further in connection with having that transfer made?

A. No sir, I did not.

Q. I take it, after the returns had been referred by the Collector to the San Francisco office of your division, they were sent by your division in San Francisco to your office in Reno, is that right?

A. Yes, with specific assignment to, in this case, Mr. Heppner.

(Testimony of Harry Green.)

Q. He was an Internal Revenue agent like yourself?
A. Right. [344]

Q. Approximately how many Revenue agents were there in Reno at that time?
A. Six.

Q. Do you know who made the assignment to Mr. Heppner?

A. It could only be a guess, Mr. Avakian.

Q. Well, if you don't know, that is the answer to my question. After you made the suggestion to the lady in the Collector's office, when was the next time that you made inquiry, or acquired any knowledge, of the status of the investigation of Dr. Kelley's returns?

A. Probably the latter part of 1951, when Mr. Heppner received the returns and I don't know whether he called my attention to it, he probably did, or whether it happened they came in in an envelope from San Francisco. All returns were sent in one big envelope and whatever agent happened to be there at the time opened and made distribution of the returns, as per instructions in the envelope.

Q. I take it you don't really remember at this time whether you saw the return yourself or Mr. Heppner told you?

A. I don't recall that. I know he finally handed it to me.

Q. Had you talked to Mr. Heppner before he contacted Dr. Kelley, if you know?

A. I know I talked to him. As to whether I

(Testimony of Harry Green.)

talked to him before the first time he talked to Dr. Kelley, I don't recall. I did talk to him on one time before he went out to see the doctor. [345]

Q. Do you recall what that conversation was?

A. Mr. Heppner had already known I had been a patient of the doctor's and I don't remember whether I told him or whether it was his idea to look at my card and see what it was.

Q. You don't remember as to whether it was his idea or your suggestion that he do that?

A. It was probably a meeting of the minds.

Q. I would like your best recollection as to which it was, if you have one.

Mr. Maxwell: Objected to as asked and answered.

The Court: The witness can say whether he recollects or not. You may answer the question.

A. It is a pretty hard question to answer, because we had discussed things very briefly, in view of the fact that Mr. Heppner saw the checks had been cashed, so whether I gave him specific instructions in regard to my card, I can't say.

Q. But you told Mr. Heppner that you had made the suggestion to the Collector's office that Dr. Kelley's returns be assigned to the Internal Revenue Agency? A. I don't remember.

Q. Do you remember whether you told him that at any later time or at any time?

A. All I can say is that I may have. I don't remember the conversation now.

Q. I believe you testified that on February 29, 1952, you sat in with Mr. Heppner in a confer-

(Testimony of Harry Green.)

ence with Dr. Kelley in the [346] agent's office in Reno, do you recall your testimony in that regard?

A. Yes, sir.

Q. How do you remember that that was on February 29, 1952?

A. Because I had a memorandum.

Q. You mean before you testified you refreshed your recollection by looking at the memorandum, is that how you fix the date?

A. I had various ways of finding out.

Q. I am just trying to find out how you did.

Q. Well, to tie in the date, I had the memorandum—you might call it a diary—that I keep, referring to various dates on various cases.

Q. As a matter of fact, you have to refer to such a memorandum in order to fix the date on that, wouldn't you, Mr. Green?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

The Court: You may answer.

A. Without that, I could probably only say that it was in February, 1952. I do know, even without the memorandum, I remember the month and the year.

Q. If I asked you to give me the dates on which you helped other agents to check things with respect to investigations of taxpayers they were investigating, would you be able, without referring to your notes, to give me the dates on which you sat in on such conferences? [347]

Mr. Brown: Objected to as entirely argumenta-

(Testimony of Harry Green.)

tive. It is asking the witness for his mind process.

The Court: Objection overruled.

A. Would you mind repeating the question?

Q. Not at all. If I were to ask you to give me the specific dates on which you sat in, took notes, with other agents in connection with their investigations of taxpayer's returns they were investigating, would you be able to recite from memory the specific exact dates on which you did that, without referring back to your memorandum?

Mr. Brown: Would the Court entertain a further objection?

The Court: Yes.

Mr. Brown: It is entirely irrelevant to any issue before the Court at this time.

The Court: It is cross examination, counsel, is testing the witness's veracity. You may answer.

A. I would probably have to refer to my notes.

Q. You say you would probably?

A. Yes, I work with a number of agents, hundreds of cases. My memory isn't that good.

Q. I don't think it would be; mine isn't. Isn't it true, Mr. Green, before you took the stand in this case, you refreshed your recollection by looking at the memorandum or notes you made at that particular conference? [348]

A. Yes, I did.

Q. Fine, thank you. Are you able to tell us how it was that you were the particular agent who happened to sit in with Mr. Heppner in the interview?

A. To the best of my recollection, I believe I

(Testimony of Harry Green.)

was the only other agent in the office at the time and Mr. Heppner is required to have another agent as a witness when questioning the doctor on financial matters.

Q. How many agents did you say were working in the Reno office? A. Six.

Q. And the other four were out on other jobs?

A. That is my recollection, they were.

Q. Was this by pre-arrangement that you sat in with Mr. Heppner, or did he just happen to see you there when Dr. Kelley came in?

A. It wasn't any more pre-arrangement than—it wasn't planned for days and weeks ahead I would be there. It just happened at the moment.

Q. Now you testified at great length on direct examination as to the statements that Dr. Kelley made at that conference on February 2, 1952. Do you recall, without going into the details now, recall that you gave detailed testimony on that this morning?

Mr. Brown: Objected to as argumentative.

The Court: He testified, that is correct. [349]

Mr. Maxwell: The government will so stipulate.

Q. Mr. Green, at that conference, did you and Mr. Heppner both take notes?

A. Yes, we did.

Q. Did you both ask questions?

A. Yes sir, we did.

Q. Did you both take notes on the same subject matter, or did one take notes while the other was questioning?

(Testimony of Harry Green.)

A. As I remember, I took the bulk of the notes while we were both asking questions. On one occasion Mr. Heppner happened to take down when I was asking questions. To my recollection, we both took the same notes at the same time.

Q. Where are those notes now?

Mr. Maxwell: Objected to as immaterial.

A. They are in the possession of the Internal Revenue.

Q. Do Mr. Brown or Mr. Maxwell have them?

A. Yes.

Q. Do you recall when you delivered them, or were you the one who delivered them?

A. I can't even answer that, because it went with the case file with my report, when the audit went in.

Q. Have you got all those work notes in some other memorandum or report? A. In what?

Q. I don't know, I was asking you. Let me re-frame the question. [350] Did you take the information that is on the notes that you hold, did you take and transcript those notes into some report or some other memoranda which was prepared in connection with this case?

Mr. Maxwell: Objected to as immaterial.

A. In answer to that I can only say that I submitted my report in 1954. Various parts of the memorandum were incorporated in my audit notes.

Q. Now you testified among other things this morning that at that conference on February 29, 1952 Dr. Kelley stated that he had a cash accumu-

(Testimony of Harry Green.)

lation of 50 thousand dollars in 1928. Do you remember that figure and that year from your independent recollection, or did you refresh your recollection before testifying, by looking at any portions of your file?

A. I remember the figure and the year because it was so unusual, and then I did look at my notes to see if it was the same.

Q. When did you look at your notes?

A. Probably just within the last few days.

Q. And are these the notes that are in the possession of Mr. Brown and Mr. Maxwell?

A. Yes.

Q. You testified in considerable detail, regarding other things that Dr. Kelley said in that conference four year ago. Did you, at this same time, a few days ago, refer to those notes in regard to the other things that he said that you testified to?

Mr. Maxwell: Objected to as characterization of the witness's testimony, that he went into considerable detail. I will stipulate he so testified.

Mr. Avakian: I will strike out the word "considerable."

Q. With regard to the other specific detailed items that you mentioned, that Dr. Kelley said in that conference four years ago, did you, in preparation for this trial, examine your notes of that conference?

A. I did, to refresh my memory.

Q. You quoted the doctor as using the words "backed up" when you testified this morning. Did

(Testimony of Harry Green.)

you refresh your recollection on that quotation by looking at your notes?

A. Again I remembered, before looking at my notes, he used that phrase, and my notes bore that out.

Q. In other words, Mr. Green, I take it your testimony is that even without looking at your notes, you were able to remember that some four years ago a taxpayer, whose return was assigned to another agent, used the words "backed up" in a conference. Is that your testimony?

A. That is correct. In all unusual things I remember it.

Q. And you testified that Dr. Kelley told you that in 1947 he brought some money out from Hubbardsville by suitcase and by train. Would you tell us, as nearly as you can remember, just what Dr. Kelley said in that connection? [352]

A. That is practically what he told me.

Q. Did he say what train he took or whether all of the trip was by train or only a part?

A. He said he brought it partly by plane and the rest of the way by train.

Q. Did he tell you how much of each?

A. In 1947——

Q. I am talking about the first trip.

A. Yes, in 1947, I don't remember whether it was 50 or 60 thousand he brought out at that time.

Q. I am not asking as to the amount. I am asking as to the means of transportation. What did he tell you as to the means of transportation?

(Testimony of Harry Green.)

A. He said he brought it out by plane to Salt Lake City and train from there to Reno.

Q. He said he took a plane from Hubbardsville to Salt Lake City?

A. He said he brought it by plane to Salt Lake City. We didn't ask him where he got the plane, what city he got on the plane. We merely asked him the general question as to the means of transportation he used in bringing out this money.

Q. And you are sure that he said nothing further as to why he came part way by plane and part way by train?

A. No, I don't recall. He didn't say anything on that point.

Q. Are you prepared to say he didn't say anything on that point?

Mr. Maxwell: Objected to as argumentative. He says [353] he doesn't recall.

The Court: Objection sustained.

Mr. Avakian: At this time, in view of the witness's testimony that he referred to the notes that were made in connection with this trial within the last few days, I would make demand of the government to produce them for examination, the notes or memorandum that were examined by the agent to refresh his recollection.

Mr. Brown: The rule requires production of the notes the witness testified from.

The Court: The Court will take this motion under advisement.

(Testimony of Harry Green.)

Q. When was this matter assigned to you to investigate, Mr. Green?

A. I believe I testified it was assigned to me in January, 1953.

Q. And then you did nothing on the case, by way of investigation or audit until October of that year?

A. That is correct.

Q. Did you, or did you not, ask Dr. and Mrs. Kelley to sign extension of the statute of limitation?

A. I have already said I did.

Q. My notes state that you said you might have. It is true that you did, isn't that right?

A. Well, I possibly did. Whether I specifically did, I don't [354] know. I do know that consents were obtained in the early part of the period.

Q. If you possibly did it, it was on your initiative, was it not?

A. Probably.

Q. The agent is responsible for getting extensions if he is not going to complete it in a reasonable period, is that right?

A. Yes.

Q. Did Dr. and Mrs. Kelley sign all extensions of the statute of limitations which you or your office requested of them?

A. Yes.

Q. At the time you went to Dr. Kelley's office to get the patient cards, can you tell me again what the date of that was?

A. October 5, 1953 was the first time I talked to him. I think the next day I obtained the cards.

Q. In what container were those cards held before you took them? What kind of a container?

A. In the type of container which they are now.

(Testimony of Harry Green.)

Q. Was that a paper box?

A. That is what I remember.

Q. Weren't they in a metal file box, Mr. Green?

A. You are referring to what they were contained in before I took them out?

Q. Before you took them out, how did the doctor keep them?

A. I don't remember whether they were in a metal or cardboard [355] box. It is my recollection that I obtained the box to put them in to take them out.

Q. Do you have a recollection as to whether the doctor stored them in a metal box?

A. I do not know.

Q. At the time you went there in October of 1953, had you already been informed by Mr. Heppner that he had looked for your patient card?

A. Yes sir, I had.

Q. What did he tell you?

A. That he couldn't find it.

Q. So that when you went to get these cards, you knew then that there was a possibility of missing patient cards becoming an issue in this case, did you not?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

Mr. Avakian: I think it is quite pertinent.

The Court: He may answer if he knows. Objection overruled.

A. I really didn't know. All I knew of my own knowledge was that my card was not found when

(Testimony of Harry Green.)

Mr. Heppner took the cards. Whether there were other cards missing, that would only be an assumption.

Q. Mr. Green, to you, as an agent, didn't the fact that Mr. Heppner had told you that one card was missing, suggest that [356] that was an area of inquiry for you as an auditor for the Internal Revenue?

A. That would be an item that would require further checking, yes.

Q. And isn't that something that would alert you to look for possibility of other missing patient cards? Wouldn't you, as an agent, just naturally follow up on that sort of thing?

A. I certainly would.

Q. Nevertheless, you took these cards without giving any receipt, is that correct?

A. Right, for the reasons stated.

Q. Did it occur to you that in the event you made an issue at some later time of missing cards, that you might be criticized for not having given a receipt, to eliminate the possibility that you might have lost some.

Mr. Maxwell: Objected to as calling for speculation of the witness.

The Court: Objection overruled. You may answer.

A. Would you mind stating your question again?

(Question read.)

A. I realized that possibility. That is why I

(Testimony of Harry Green.)

explained to the doctor that, in view of the tremendous number of cards, he would have to rely on my good word I would bring back every card I had taken.

Q. As a matter of fact, you did not take back every card? [357]

A. It was certainly an oversight.

Q. You don't know how many other cards might have been misplaced by oversight?

A. To the best of my knowledge, those were the only three cards that were held out.

Q. Incidentally, when did you first find out that those cards had been held out?

A. I believe it was just before the trial this morning.

Q. Can't you give us any more specific than that? A. I can't.

Q. Wasn't this a very unusual thing to find some cards, after you had reported and returned everything to the taxpayer?

A. No—it was unusual to find the cards, yes, but in this particular case you had to bear in mind that my examination was completed in the early part of 1954. Mr. Black, who worked with me on the case, then had occasion to write his report and in the interim he was transferred to San Francisco. Now there were folders going back and forth and as near as I can tell that is the reason we did not discover it sooner.

Q. What I am trying to find out is just when was it that you uncovered this fact?

(Testimony of Harry Green.)

A. To my knowledge, it was just a little while before the trial.

Q. Can you give me the date?

A. No, I can't.

Q. Was it less than two weeks ago? [358]

A. It may have been two weeks, may have been a month ago.

Q. Could it have been February 29th?

A. I don't think so.

Q. How did you discover that these cards were still in the possession of the Internal Revenue?

A. Looking over some of the folders one day that had superseded the new work sheets, I found these cards.

Q. Where were they? A. In the folders.

Q. Did you then find them? A. Yes.

Q. What folder did you find them in? Were they all together or in different folders?

A. All together.

Q. In one folder? A. Yes.

Q. But you can't remember what folder that was? A. No.

Q. What did you do next with respect to the discovery of these cards, after the discovery?

A. I informed Mr. Maxwell and Mr. Brown that I found them.

Q. Was that before the trial started?

A. I believe so.

Q. Let us see if we can make it more definite as to your belief. Were you present when Mr.

(Testimony of Harry Green.)

Maxwell make the opening [359] statement in this case, in which he referred to missing cards?

A. Yes.

Q. At that time had you already told him that you had some of these cards?

A. I believe I did.

Q. You are not sure, Mr. Green?

A. No, honestly I am not. I know I notified Mr. Brown when I found the cards. The exact date I do not remember and I don't know whether it was before the opening statement or not.

Q. You returned various records to Dr. Kelley in December, 1953, did you not?

A. Mr. Black and I did.

Q. At that time were you of the belief that you had returned to Dr. Kelley every single one of the records you had obtained from him?

A. Yes, I was.

Q. You were confident of that; in fact, you said so, did you not? A. Yes.

Q. Can you tell me on how many other occasions you have located in the Internal Revenue files, records of a taxpayer, after you had informed the taxpayer that you had returned all of his records to him?

Mr. Brown: We will object to that, your Honor, things that would have been between other parties not parties to this [360] transaction, are irrelevant and immaterial.

The Court: Objection sustained.

Mr. Brown: I request the Court to admonish

(Testimony of Harry Green.)

the jury to disregard the question. I think it is highly prejudicial.

The Court: Ladies and gentlemen, you are given the usual admonition by the Court, any questions asked that the Court may consider objectionable, you are not to consider.

Q. Do you remember the specific person to whom you gave these patient cards after you discovered them?

A. I believe both Mr. Maxwell and Mr. Brown were present when I gave them. I said, "Here they are."

Q. Do you remember where that was?

A. No, it was back in Reno, it was back in Reno, I know that.

Q. Is there a possibility it was in Carson City?

A. No.

Q. You are sure it was in Reno? A. Yes.

Q. Do you remember where in Reno, Mr. Green?

A. We do most of our work there.

Q. I am asking about the return of these particular cards. Can you tell me, if you know, where you returned those cards?

A. I am not sure. I know it was turned over to them in that building, whether in that room or in the Internal Revenue office a floor down, I don't know.

Q. Did you have any discussion with them about this matter [361] that would refresh your recollection? A. No.

(Testimony of Harry Green.)

Q. There was no discussion at all, you just handed them across?

A. That I had found the cards in the folders.

Q. You said folders?

A. I mean folder. It was always one folder.

Q. Has any of this questioning refreshed your recollection as to what folder that was?

A. No.

Q. You stated that before you took the patient cards, you explained to Dr. Kelley that he had the legal right not to let you take them, is that correct? Did I understand you right?

A. That is correct.

Q. He nevertheless said that you could take them, is that right? A. That's right.

Q. As a matter of fact, you could have worked on these patient cards in Dr. Kelley's home, without ever removing them from the premises, under his control, is that right, Mr. Green?

A. It would be very difficult with three children running around the house.

Q. Well, he has a finished room in the basement that is available for work space, is that right?

A. I don't know.

Q. Did you make any inquiry about that?

A. No. [362]

Q. Incidentally, did you also advise Dr. Kelley that he didn't have to discuss these matters with you under the law, if he did not want to?

A. No sir, regular routine examination.

Q. You later advised him of that, is that right?

(Testimony of Harry Green.)

A. No.

Q. You do not recall ever advising him?

A. That he didn't have to discuss these matters with us? I believe that he came up for a statement in Mr. Black's office and Mr. Black gave him that information.

Q. Were you present then?

A. I was present.

Q. And Mr. Black advised him he didn't have to answer any of your questions under the law, if he didn't want to, is that what he advised him, he didn't have to answer any questions if he didn't want to? A. To my knowledge, yes.

Q. He nevertheless permitted you to question him, did he not?

A. He had his attorney present.

Q. His attorney, for the record, is Mr. Lohse?

A. Yes, sir.

Q. And that one time, is that right?

A. Correct.

Q. Did you ever make a request of the doctor or Mrs. Kelley which they declined? [363]

A. Not that I recall.

Q. Have you prepared any report in this matter which set forth your conclusions as to the amount of income of Dr. and Mrs. Kelley?

Mr. Maxwell: Objected to as immaterial.

Mr. Avakian: I am not asking as to the contents, but simply if he prepared a report.

The Court: What do you mean by report?

Q. A report which would have been submitted

(Testimony of Harry Green.)

to his superiors, setting forth the results of his investigation, with respect to the amount of tax liability.

The Court: I don't understand it.

Mr. Avakian: Possibly I can develop it this way, your Honor.

Q. Is it the normal practice of the Revenue agents, Mr. Green, and yourself, when you concluded investigations to write up a report?

A. Yes.

Q. That is called a Revenue agent's report, is it not? A. Yes.

Q. Commonly abbreviated "RAR"?

A. Yes.

Q. And that sets forth your conclusions as to the amount of adjustments, if any, should be made in the return, with respect to income and taxes, does it not? [364]

Mr. Maxwell: Your Honor please, I believe that is completely immaterial in this case. Any question of civil liability of the defendant is not in issue here.

Mr. Avakian: I think it has a bearing, your Honor.

The Court: You may answer.

Q. I will repeat it. The RAR sets forth the results of your investigation in terms of the adjustments which you think should be made in connection with the income and taxes shown on the taxpayer's return, is that correct?

A. That is correct.

(Testimony of Harry Green.)

Q. And sets forth whatever explanation you may include in connection with those efforts?

A. Yes.

Q. Now, without asking you at this point the contents of your report, did you submit that report in this case?

Mr. Maxwell: Objected to as immaterial. On the further grounds it is not in issue here.

The Court: Objection overruled.

A. Yes, I did.

Q. Was there anything in that report, anything reflected in that report, that was tied in in any way with any of these three missing patient cards, particularly the Florence Case card?

Mr. Maxwell: If the Court please, counsel is now asking the witness what is in the report, which he knows is not proper in the first place; in the second place, that is a matter [365] relating to civil liability, which is not in issue in this case.

The Court: As the Court looks at it, the question of these three cards has been raised and counsel has merely asked if the report—you may answer.

A. To the best of my recollection, the three cards played no part in the adjustment arrangement.

Q. You say to the best of your recollection. Are you quite sure of that, or can you refresh your recollection if you refer back to any files or reports at the office?

A. I do not think I need to refer back. I will say that it did not.

(Testimony of Harry Green.)

Q. You are willing to say that?

A. Yes sir.

Q. Had the folder, in which these cards were contained, been in the possession of any agent other than yourself?

Mr. Maxwell: Objected to as immaterial.

Mr. Avakian: I think we are entitled, your Honor, to explore the review of these things.

The Court: Objection sustained. He has explained how the cards were prepared.

Q. Mr. Green, when you were testifying this afternoon, regarding cash available to Dr. Kelley for expenditures in the years 1949 to 1952, you included in 1949 the cashing of a thousand dollar bond, the proceeds of which were not deposited in a bank. Do you recall that? [366]

A. Yes sir.

Q. You did not include the cashing of any bonds in 1950. Is it not true that your investigation showed that he cashed bonds in 1950, portions of which were not deposited in the bank?

A. The investigation that we made showed that the vast majority of the cashed bonds in 1950 went into the bank, were presented in deposits. Any small amounts that did not appear in there wound up in stocks and other assets.

Q. To the extent that happened, those other assets were used for bonds? A. Yes.

Q. And the sale of war bonds was available for cash for the purchase of other assets, is that correct?

(Testimony of Harry Green.)

A. The investigation did not show, as I recall now, any bonds being used in 1950 for the purchase of securities. They all went into the bank account.

Q. Do the notes which you have there show what was realized from the sale of bonds in 1950?

A. No, they do not.

Q. I call your attention to Exhibit 118; that shows that in 1950 bonds were cashed and figures contained there is not proceeds but cost of those bonds. Would you give us the cost figure there?

A. This is the cost figure.

Q. Yes, would you state it?

A. \$24,862.50. [367]

Q. Now the proceeds would include any interest earned on those bonds? A. That is correct.

Q. Can you tell, by referring to any of your notes or to the tax returns, tell me how much that was? A. The amount of interest?

Q. Yes, would you state the amount of interest on the sale of war bonds in 1950?

A. There is no detail on it. I may have notes here—\$1086.

Q. So that over 26 thousand dollars was realized from the sale of bonds in 1950, is that right?

A. That is correct.

Q. And I take it you are not able to tell me at this point how much of that was not deposited?

A. It was all deposited.

Q. Are you quite sure of that? A. Yes.

Q. How about 1951? I will give you the figure of cost and you can add the interest figure. Exhibit

(Testimony of Harry Green.)

118 shows bonds cost \$7,537.50 were cashed in that year. How much would that be for interest?

A. \$1095.

Q. So roughly \$8500, is that right?

A. Right.

Q. And do you know whether or not that was all deposited? [368]

A. May I have just a moment please?

Q. Surely.

A. May I read from my work papers?

Q. If you just give us conclusions, that will satisfy me, Mr. Green.

A. In the year 1950 there was realized from bonds \$25,948.50, of which the entire amount went into the bank account. The year 1951, including interest and principal cost, the amount realized was \$8,257.50, also in bank account.

Q. Mr. Green, among the papers that you obtained from Dr. and Mrs. Kelley, was there copy of the 1951 tax return? A. Yes.

Q. And did that have attached to it an adding machine tape? A. Yes.

Q. I am going to ask you if the document, which I am now showing you, is the document you have seen with the tape attached to it?

A. I believe so, yes. I don't remember these notes on the dividends attached.

Mr. Avakian: Your Honor, I would like to offer this in evidence at this time as defendant's exhibit next in order. Since it is lengthy, I might state, for the information of counsel, that the important

(Testimony of Harry Green.)

items are the adding machine tape and item on the return that refers to the interest.

The Court: The offer will be received in evidence as [368-A] defendant's Exhibit D.

Q. Mr. Green, did you examine this adding machine tape and this note of the figures on it in connection with your examination?

A. Yes, I have seen that tape and used it in tying up the interest reported for that year.

Q. Did you find any error in the interest reported for that year? A. As I recall, no.

Q. Did you learn, from your examination of this, that the adding machine tape was prepared by the bank where the bonds had been cashed?

A. I had no knowledge of that.

Q. The adding machine tape shows, in the upper part, the amounts realized on each individual bond, does it not?

A. I can't tell without looking at it.

Q. All right, I will bring it back.

A. That appears to be the case.

Q. And at the lower part of the tape it lists the cost price of the individual bonds, isn't that right?

A. Yes, that must be the case, yes.

Q. And there is calculated the difference between the total cost price and the total proceeds in arriving at the amount of interest, is that right?

A. Yes.

Q. And that figure is carried forward into the returns as interest? [369]

(Testimony of Harry Green.)

A. In this particular case the \$1005 in that return shows \$1095.

Q. I call your attention to the very top of the adding machine tape, where in for sale there is reference to two individual bonds with \$90 interest figure. That makes up the difference, does it not?

A. Yes.

Q. Would you match the proceeds of the bonds with the bottom portion of the tape, which lists the cost of the bonds, and tell me if you do not find from that that the section for interest fails to include the cost of one bond that was sold for \$470? Take as long as you need.

A. The only way I can do that is to count these by number.

Q. I think you can group them by size of bonds and match them in that way.

Mr. Maxwell: Would the stipulation we have entered into as bonds assist the witness in any way, counsel?

Mr. Avakian: No, I think it can be done best by matching.

A. Now there are a number of \$75 bonds which are detailed as to gross proceeds, but we did not try to match them and all you have is a summary figure.

Q. Show me the item you have in mind. Will you count the number of \$75 bonds mentioned? These are \$100 bonds costing \$75, [370] is that right? Count them yourself and give me the total?

A. Thirty-three \$75 bonds.

(Testimony of Harry Green.)

Q. Thirty-three bonds of \$100 face value, which cost \$75, is that right?

A. That is correct. That is what the top portions show.

Q. Can you find a figure which represents 33 times 75 in the cost section? A. Yes, 2475.

Q. So it is in there, is that right? A. Yes.

Q. Now there are in all five items left on the upper portion. Can you match those with anything in the lower portion?

A. Yes, I can. I can match the thousand dollar bond to the \$750 bond here.

Q. There are four of those?

A. That is right.

Q. You find on the upper portion \$470 realized on the sale of the bonds, is that right?

A. Yes.

Q. That would be five hundred face value?

A. Yes.

Q. And they cost \$375, do they not?

A. \$375 or \$350, I am not sure.

Mr. Avakian: Perhaps counsel will stipulate \$375 is the cost of a \$500 bond. [371]

Mr. Maxwell: I wouldn't know.

Q. Did you find any cost in the cost section of the tape to match up with the \$470 sale?

A. No sir, I did not.

Q. Is it not correct, then, that because of that amount of interest from the bonds reported on the income tax return was overstated on that \$500 bond?

(Testimony of Harry Green.)

Mr. Maxwell: If you know.

A. From this tape, I would have to say yes.

Q. Let us see if we can give the cost. \$25.00 bond cost \$18.75; \$50 bond cost \$37.50; \$500 bond cost \$375, isn't that right?

A. Or 350, I am not sure which is correct—I believe \$375.

Q. Thank you. Now then, Mr. Green, in your examination of that return and that tape, you failed to find that the taxpayers had made an error against their interest of \$375, is that right?

A. Probably, yes.

Q. Not probably, it is a fact, isn't it?

A. That was not the whole basis of my investigation.

Q. The fact is that you failed to find that error in payment, isn't that correct? Do you understand the question?

A. I understand your question. I am referring to my work sheet. I don't remember now. I don't have my original work sheet. However, that wasn't the basis of the examination.

Q. If you find in the overnight recess, from examination of [372] other papers that you had caught this error, would you let me know tomorrow? A. Yes.

Q. Now you testified that at some later stage of the investigation Dr. Kelley's representative, Mr. Lyon, furnished you and Mr. Black with the reconciliation bank balances that you testified to?

A. Yes.

(Testimony of Harry Green.)

Q. He also gave you considerable other information which you requested, did he not?

A. He gave us various information, yes.

Q. He also presented to you the result of various items of accounting analysis in answer to questions.

Mr. Maxwell: Objected to, hearsay, calling for conclusion of the witness. Not proper cross examination of this witness.

The Court: You may answer.

A. Mr. Lyon did furnish us with certain information pertaining to expenses and bank account and life insurance and a few other items.

Q. And was that during 1954?

A. I believe it was. Without referring to any data in my folder, I think it was.

Q. Mr. Lyon didn't have any conversations or discussions with you, as Dr. Kelley's representative, until some time after December [373] of 1953, isn't that right?

A. Yes, that is correct.

(Jury admonished and recess taken at 4:00 p.m.)

Wednesday—April 4, 1956.

10:00 A.M.

Defendant present with counsel. Presence of the jury stipulated.

Mr. Brown: Your Honor please, the Court directed that memorandum be served on the question that was presented on presentation of the checks. The government's memorandum is in the

process of being typed. We should have it within the hour.

Mr. Avakian: May the record show we filed our request for the memorandum.

The Court: Yes, let the record show. You may proceed.

Mr. Brown: We would like an opportunity to argue it, your Honor.

The Court: We will consider that later.

MR. GREEN

resumes the witness stand on further

Cross Examination

Q. (By Mr. Avakian): Mr. Green, just a few more questions this morning. In reviewing my notes, I find that your testimony is that you took the patient cards from the doctor's office to your own office in October of 1953 and that those cards were returned in December of 1953. Now will you tell us where those cards were during [374] that intervening period? In whose custody and possession and tell us what was being done with them.

Q. First of all, Mr. Avakian, those cards were not held for that entire period. The first group of cards, which were obtained from the doctor, were obtained October 6, 1953 and I returned that group on November 6th, I believe, and at that time Mr. Black and I picked up the balance, which were finally returned in December. The matter of where the cards were and what was being done with them, the cards were in the Internal Revenue Service of-

(Testimony of Harry Green.)

fice, Post Office Building, Reno, Nevada, in my custody. They were being transcribed by me, and then after Mr. Black entered the case by him.

Q. And when did Mr. Black enter the case?

A. He entered the case formally, I believe, November 5th or 6th, 1953, which would be the time that Mr. Black and I went over to see the doctor.

Q. You say he entered the case formally—then was he in the case on some informal basis?

A. No, he was not. We were working independently of each other.

Q. Was he working on this case at that time?

A. He had his own job and I had mine.

Q. Your present knowledge of his entering on this case, then, was some time in November, 1953?

A. Yes.

Q. That was before you had returned the first batch of cards, [375] is that right?

A. It was almost the same time. It would only be a day or two—whether before the cards were returned—I know at the time the cards were returned, he went with me and I believe at the time he had a formal assignment to enter the case officially from the office.

Q. What I am getting at is this, did Mr. Black himself handle any of these first batch of cards or work on them in any way?

A. He may have, I am not sure.

Q. You say that you were transcribing these. Will you state what you were doing?

A. Yes, I was taking each patient card and list-

(Testimony of Harry Green.)

ing the names of the patient, address, and the amount of payments by years on a work sheet.

Q. Where were you doing this work?

A. In the Internal Revenue office.

Q. And you took the card out of the box and copied the data from it, is that correct?

A. Correct.

Q. And put the card back? A. Yes sir.

Q. And went on in that fashion. Over what period of time were you doing this, with respect to the first batch of cards?

A. I picked up the cards in October and returned them in November, so a period of a month.

Q. Were you also working on other matters during that same period of time?

A. I probably was. I would have to refer to my book that I keep the cases in. I probably had other cases.

Q. Isn't it a fact, Mr. Green, that during this period, while you were doing this transcribing, you would at times leave the cards and your working papers on your desk while you answered the telephone or went into another office or did something on another matter?

A. As far as leaving them on the desk and going into another room, at that particular time we only had this one room.

Q. You would at times go into other interviewing and see taxpayers?

A. If I had done that, everything would have been put away.

(Testimony of Harry Green.)

Q. Where did Mr. Black work on the cards?

A. To the best of my recollection, he worked part of the time in the same room I did and part of the time in his own office, which I believe then was just a couple of doors down the hall.

Q. When he worked in his own office, did he take the cards there?

Mr. Maxwell: We object as calling for hearsay. When I put Mr. Black on the stand, counsel will have ample opportunity to inquire about the cards and transcribing.

Mr. Avakian: I am not asking about hearsay, Mr. Green knows whether he took them or not.

Q. I am trying to find out whether some of these cards were moved from your office to Mr. Black's office, if you know.

A. I don't know.

Q. Was there any period of time when you and Mr. Black were both working on these cards, during the same period of time?

A. Oh yes, there was.

Q. Were any of these cards photostated?

A. To the best of my knowledge, I don't believe they were.

Q. Not a single one?

A. Not that I know of.

Q. Were some of these patient cards in groups that were stapled together; that is, single cards on a single patient, were they fastened with a staple?

A. I believe there were a few like that.

Q. In those instances, did you remove the staple,

(Testimony of Harry Green.)

or did you simply pull the card at the corner to look at the stapled cards?

A. I am not sure; I probably would not remove the staple.

Q. Would you pull them?

A. That is right.

Redirect Examination

Q. (By Mr. Maxwell): I believe you said Mr. Black came into the case at your request, in joint investigation?

A. He actually worked with me directly.

Q. Will you tell us what a formal request for joint [378] investigation is?

A. When we, as Internal agents, find evidence of a fraud, of what we believe might be evidence of a fraud, we immediately write a letter to our superiors, requesting cooperation of the Internal Revenue Service and indicating in our report—that is a memorandum type of report—what indication of fraud we have found.

Q. Mr. Green, yesterday counsel inquired at some length of you with respect to an interest on a bond overstated on one of the returns. I don't recall which one it was, do you?

A. Yes, 1951.

Q. Now did you last night further check your file on that matter? A. I did.

Q. And what did you find?

A. I found that Mr. Avakian was correct.

Q. And on the return——

(Testimony of Harry Green.)

A. On the return the interest income from the bond had been overstated. The taxpayer reported on this particular item of interest income \$470. The true interest income on this particular bond was \$95, an overstatement of \$375.

Q. Now did it appear that was an intentional overstatement of interest, or was it simply an inadvertent error?

Mr. Avakian: Well, your Honor, is Mr. Maxwell asking what the intent of the bank was? [379]

The Court: I don't know.

A. It appeared to be just an oversight.

Q. Now, Mr. Green, one other thing. If you will recall, yesterday—and with the indulgence of the Court and counsel, this likely would be more proper on direct than redirect——

Mr. Avakian: We have no objection.

Q. If you recall yesterday we discussed the use of currency by Dr. Kelley during 1949 to 1952?

A. Yes.

Q. And you gave certain items which indicated currency available during the years 1949-1952?

A. Correct.

Q. Now did you also look at the doctor's records with respect to his paid invoices and check register and find what invoices were paid by cash for the years 1949 and 1952?

A. Yes, I did.

Q. Now I wonder if you have those amounts for those years?

A. Yes, I do. For the year 1949 the amount

(Testimony of Harry Green.)

of invoices paid in cash, not reflected in the check register, was \$2,391.14. For the year 1950 the amount was \$1,784.40. For the year 1951 the amount was \$1,325.67. For the year 1952 the amount was \$1,857.63. There is one other point that should be brought out about the interest on the bond. The basis of my examination of the taxpayer was the net worth basis, which would have automatically taken into effect any overstatement of income by the [380] doctor on bonds and give him credit for the overstatement.

Q. In other words, that overstatement would be automatically accounted for in a net worth statement, is that correct? A. That is correct.

Mr. Maxwell: You may inquire.

Recross Examination

Q. (By Mr. Avakian): On that last point, Mr. Green, you didn't start out this case using net worth method, did you?

A. That is a difficult question, difficult to answer.

Q. Isn't it a fact, Mr. Green, that the custom, the practice which you follow, and which your office follows, in conducting audits generally, is to initially examine the return for possible errors and use the net worth method only if it develops, during the course of your examination, that you think the net worth method would more accurately reflect the taxpayer's income?

A. I believe that is probably true. That is a

(Testimony of Harry Green.)

question difficult to answer yes or no. On each case it is entirely different.

Q. Your answer, it is probably true, satisfies me.

A. I might add that we try to use whichever basis is determined to be most accurate.

Q. And the fact is, Mr. Green, that you looked at these returns to see if there were any errors on them which would have had the effect of proportionately reducing the doctor's tax, [381] didn't you?

A. I don't understand.

Q. Didn't you look to see if there was anything on his return which was wrong and which would work to his disadvantage?

A. Your Honor, I don't quite understand.

Q. When you make an examination of a taxpayer's return, don't you, as a matter of general procedure and practice, look to see if there is anything on that return which shows that the taxpayer made an error in his own favor?

A. We look at it from both standpoints. Our job is to determine the correct tax, whether that is overstated or understated.

Q. And the plain fact, to be honest, is that you just didn't catch this error on the bond interest, isn't that right?

A. I accepted the figures on the taxpayer's returns because I was applying the net worth method on my report and it wasn't necessary.

Q. But did you start out ignoring the return and using the net worth method, or did you go to the net worth method later?

(Testimony of Harry Green.)

A. I started out the investigation on the basis of supporting items of professional income, and the rest of the income reported was probably correct. We found otherwise.

Q. With respect to the amounts that were paid by cash, referring to the invoices that you just testified to, are those the invoices that you obtained from the doctor and Mrs. Kelley?

A. Yes sir, they are, which were returned and receipted for. [382]

Q. Now you testified on your redirect examination about a joint investigation and explained that by saying that when you agents found what you believed to be evidence of fraud, you wrote a report setting that forth. Did you write such a report, requesting joint investigation in this case?

A. I did.

Q. When was that report written?

A. I believe it was either November or December, November 6, 1953.

Q. That was at the time when you had the first portion of the doctor's patient cards, is that right?

A. Yes, it was.

Q. And it was before you had completed your analysis of that portion or not?

A. You can't really say whether it was from analysis made, because during that period of time it was simply a question of transcribing the patient cards and I was trying to find as to other items, especially bank deposits, which was included on there.

(Testimony of Harry Green.)

Q. In any event, you hadn't yet made any examination of the balance of the records?

A. I had looked at some of them.

Q. You said you took one batch back in November and got another batch then?

A. Yes. [383]

Q. At the time you wrote this report, requesting joint investigation, you hadn't yet examined the second batch, is that right?

A. That's true.

Mr. Avakian: That's all, thank you.

(Witness excused.)

ROBERT BLACK

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name? A. Robert Black.

Q. You have been previously sworn?

A. Yes.

Q. Where do you reside, Mr. Black?

A. San Mateo, California.

Q. What is your occupation?

A. Special Agent, Internal Revenue Service.

Q. When did you become a Special Agent for the Internal Revenue Service?

A. March, 1950.

Q. Where were you stationed at that time?

A. In San Francisco.

Q. Were you ever stationed in Reno?

(Testimony of Robert Black.)

A. Yes, I was. [384]

Q. When was that?

A. From August, 1953 to January, 1955.

Q. Prior to becoming a Special Agent, what was your occupation?

A. I was an accountant.

Q. For what concern?

A. Krasco Manufacturing Company.

Q. Can you describe what your job was?

A. It was accounting and office manager.

Q. Was it a manufacturing firm? A. Yes.

Q. Small or large? A. Small.

Q. Now, Mr. Black, did you attend a university?

A. Yes, I did.

Q. What university?

A. Southwestern University.

Q. And did you receive a degree from the Southwestern University?

A. Yes, Bachelor of Commercial Science.

Q. When did you receive that? A. 1949.

Q. Mr. Black, you had something to do with investigation of income tax liabilities of Wayne P. Kelley for the years 1949 to 1952, did you not?

A. Yes.

Q. And when did you begin your investigation?

A. I received assignment on the Kelley case on September 22, 1953.

Q. And did you thereafter discuss the case with Special Revenue Agent Green?

A. Yes, Special Agent Green.

(Testimony of Robert Black.)

Q. And after that date did you have any conversations with Dr. Kelley?

A. Yes, on November 6th I went with Mr. Green to the doctor's office and had a conversation.

Q. Now, Mr. Black, your assignment in September, was that a preliminary assignment, or a formal request to join the investigation?

A. Preliminary.

Q. When did you receive your formal assignment, do you recall?

A. I really don't know; I believe some time about the middle or latter part of November.

Q. I think you said you saw the doctor on November 6, 1953 for the first time?

A. That is the first time.

Q. Who was with you, if any one?

A. Mr. Green.

Q. Did Mr. Green have any of the doctor's records with him?

A. Yes, the purpose of our visit was to return records [386] Mr. Green had earlier picked up some records.

Q. Were those patient cards?

A. That was the records.

Q. Was there any one else present when you saw Dr. Kelley?

A. No one besides Mr. Green and Dr. Kelley.

Q. Can you tell us what was said at that date?

A. Yes, we asked him some questions as to the patient cards. He said all the income he received from medical practice was on the patient cards. He

(Testimony of Robert Black.)

said he destroyed some of his cards, which he referred to as "no goods"; that he said where a patient had paid their bills. We asked him about his checks and he said all his checks from medical practice were deposited, except on some occasions small checks were cashed. I believe he said the biggest was \$5 checks, in that amount.

Q. Did he say also that he cashed money orders?

A. No, he put money orders in the same category as cash, or those were also cashed. We asked him about his liabilities. I had seen the net worth statement he had given and there were no liabilities listed on the statement, so I asked him about that. He said he had no liabilities, and a little bit later he mentioned at one time he had a loan on a Ford, about 1946, and the reason he had a loan on the Ford was because his brother and sister had custody of some cash and he was without ready cash at the time, or was without ready cash.

Q. Did he say what year he had the loan? [387]

A. 1946.

Q. Did the doctor say anything as to the necessity of cashing checks?

A. Yes, when we asked him about his deposit of checks, he said it wasn't necessary to cash checks, that he had large cash reserve, he didn't have to cash checks for living purposes.

Q. Did he mention the extent of his income during the period at all?

A. No, I don't think we asked him about that,

(Testimony of Robert Black.)

other than to say that all of his medical income was reported on his patient cards.

Q. Did you thereafter have any further conferences or conversations with Dr. Kelley?

A. Yes, we did. We saw him about two or three times after that and returned the records and picked up additional records, but I do not believe there was any conversation. The next conversation we had with him was on February 4th. We arranged to go and see Dr. Kelley for a formal interview.

Q. Was Mr. Lohse present?

A. Yes, Mr. Lohse and Mr. Green were there. I was there and a stenographer, Mrs. Baldwin.

Q. What date was this?

A. February 4, 1954.

Q. Was Mr. Lohse present throughout the conversation?

A. Yes. [388]

Q. Do you recall what was said at that time?

A. Yes, I recall we said several things. The first thing I believe we asked him was about his tax returns. He identified his returns from the years 1946 through 1952.

Q. Those are the same returns in evidence here?

A. That is correct. He said that he and his wife had prepared the returns and that the returns were prepared from deposit slips and his work sheets, which I believe contained monthly totals. We asked him some questions about his records. As I recall, he said that all of the checks and deposits were on deposit at the same bank, which would be the First

(Testimony of Robert Black.)

National Bank of Nevada. We discussed his cash on hand for the year. He submitted a net worth statement, showing \$19,000 cash on hand. We asked him about that and he said that that had been kept in Hubbardsville during the time he was in New York. He also said at one time that his sister knew this; that while he was in Reno the money was first kept in the refrigerator and subsequently put into a strong box. We asked him to list his bank accounts and he said they were all listed on the net worth statement.

Q. When you say net worth statement, be sure we are talking about the same thing. You refer there to Exhibit 121 in evidence?

A. Exhibit 121, yes, these are the net worth statements. We showed him these statements and he identified his signature to them. [389]

Q. His wife is the other one?

A. His wife signed the other one. He mentioned that all his bank accounts were listed on these net worth statements. I asked him if he had any other bank accounts, either in his own name or in the names of other parties not shown here and he said he had none. Now in regard to his records, we asked him if he still had all his records and he said some of his "no good" patient cards had been disposed of. He had receipt books only for the period of September 1951 through 1952. We asked him for prior receipt books and he said he discarded those.

Q. When you say receipt books, will you tell us what those are?

(Testimony of Robert Black.)

A. It was a bound book, containing duplicate copies of receipts he issued to the patient. These were carbon copies. We asked him about appointment books. He said he had discarded all his appointment books.

Q. Did he say anything with respect to whether or not all his income had been reported?

A. Yes, he said all the checks and cash and various things had been reported.

Q. Did he say who maintained his records?

A. He said he maintained his medical income records himself.

Q. Did you ask him anything about filing, how that was accomplished?

A. Yes, we asked him about filing. He said he took his records home for a period of one or two weeks at a time and [390] filed them there.

Q. Did you ask him about any non-taxable bonds he might have received during the years in question?

A. Yes, we asked him if he had any gifts or inheritances during the years 1946 to 1952 and he said no.

Q. Did you have any conversation with respect to mortgage on his airplane?

A. Yes, I remember something about that. He said at one time he had a paper mortgage and the explanation on that was that he merely had a paper mortgage on it and the purpose of that was to protect the seizure by one of his wives.

(Testimony of Robert Black.)

Q. Now did you, at that conference, ask him for information with respect to his living expenses?

A. Yes, we asked for a resume and he said at that time he would have to prepare that.

Q. Did you ever receive any information of his living expenses? A. No.

Q. Other than what you found in the records?

A. Other than what was in the records, that is right.

Q. Did Dr. Kelley tell you at that time who made the entries on the patient cards?

A. I believe he said he made the entries on the patient cards. I remember he did say that he maintained the records of his medical income.

Q. Mr. Black, did you look into the matter of purchase of stock [391] by Dr. Kelley from George McKaig, I believe in the amount of \$25,003.21?

A. Yes, we checked Mr. McKaig's records.

Q. Did you also check the doctor's records?

A. Yes.

Q. Did you find where a refund had been given by Mr. McKaig to Dr. Kelley? A. Yes.

Q. How much? A. \$750.

Q. When was that given?

A. I don't remember the date, sometime in 1952. I have the date in my records.

Q. Now did you, at any subsequent time, have a further conference with Dr. Kelley or his representatives?

A. Yes, we did. We talked to Mr. Lohse and Mr. Avakian several times. On one occasion we had a

(Testimony of Robert Black.)

conference with Mr. Lohse, Mr. Avakian and Mr. Lyon and Mr. Green.

Q. Other than the statements of Dr. Kelley, to which you have already testified, did you receive any further information with respect to cash on hand at that time? A. No, we did not.

Mr. Avakian: At what time?

Q. What was the date of that conversation?

A. I don't recall that date, I believe it was the latter part [392] of February.

Mr. Avakian: Is this the conference I attended up here?

Mr. Maxwell: I think so. Do you wish to supply the date?

Mr. Avakian: May I suggest June 9, 1954?

A. Some time after the conference with Dr. Kelley. June probably may be right.

Mr. Avakian: June 9, 1954, at 2:00 p.m.

Q. Did you receive certain records from Mr. Avakian at that time, or Mr. Lyon?

A. Not at that time, no. I believe it was decided at that conference that Mr. Avakian would allow certain records to be made available to us, but we actually received them some time later from Mr. Lyon.

Q. Did you receive any further information as to cash on hand? A. None at all.

Q. Did you ask for it? A. Yes.

Q. Did you, after that conference, receive for inspection work sheets attached to returns?

(Testimony of Robert Black.)

A. Yes, they were made available to us by Mr. Lyon.

Q. Those were Dr. Kelley's work sheets?

A. Yes.

Q. Do you recall whether they were handwritten or typewritten? [393]

A. As I recall, they were hand writing.

Q. Showing you some yellow sheets, defendant's Exhibit D, are those the work sheets you inspected?

A. Yes, these are the work sheets.

Q. That is for the year 1951? A. Yes.

Q. Did you inspect some sheets for the other three years in question, 1945 to 1952?

A. Yes, 1949-51-52. The work sheet for 1952 was not as complete in detail as this particular one.

Q. Now, Mr. Black, after you entered the case, did you and Mr. Green make transcripts of certain of Dr. Kelley's records? A. Yes, we did.

Q. What transcripts did you make?

A. Well, we transcribed some of his patient cards, partial transcript of patient cards; transcribed the available receipt books.

Q. Before you go into the other records, let us find out what you transcribed from the patient cards. Will you explain that?

A. Transcribed only those cards from which we could tell there was payment made during the years 1948 through '52.

Q. How is a patient card set up? I will put it on the blackboard. Now is this the type of patient card? Can you tell me how this was set up? Maybe

(Testimony of Robert Black.)

it would be better if you come down here and try to do this. I want the card relating to financial [394] transactions.

A. The name and address was on top of the card, and I believe it had some reference here to the patient's family, his father's name or his mother's name, and down here several lines, all the way across the bottom, is the column, date; second, was his medical history, and on the right side is three columns, first, for charge; second for payment, and I believe the last column the balance.

Q. Now you say you didn't transcribe all of the cards? A. Yes sir.

Q. Which ones did you transcribe?

A. Well, in the first place, some cards didn't contain the years, so we didn't transcribe those. We transcribed only those which it was positive told there was a payment made during the years we were investigating, 1948 through 1952.

Q. In other words, you transcribed only cards that had figures in the payment column or some other indication on the card?

A. Or some other indication of a payment. Now there were certain cards which had a charge and no other information. We don't know whether that charge was paid or not and we didn't always transcribe those cards. Now if the payment column had an entry and if we could always determine paid, we transcribed that card giving that information. Now in some cases the card would have a charge and a balance and a subsequent date the balance would be

(Testimony of Robert Black.)

reduced to zero, and the proper amount, we [395] would transcribe that.

Q. If the balance was down to zero?

A. If the balance was reduced to zero, or reduced.

Q. What other records did you transcribe or look at?

A. We transcribed the available duplicate receipt books, which was from the latter part of September, 1951 and through the year 1952. We transcribed his duplicate deposit slips, put those on the cards, and we also transcribed some records we had of his stocks and we transcribed his check register.

Q. Did you transcribe the check register, or did you say that?

A. The check register we did transcribe.

Q. I believe you said that Dr. Kelley informed you on February 4, 1954, of the manner in which he computed his medical income, is that correct?

A. Yes sir.

Q. I wonder if you would state that again?

A. He said he computed his medical income for his tax returns from duplicate deposit slips, and also that he used some work sheets which contained monthly totals of the deposit slips.

Q. Now you transcribed those documents, duplicate deposit slips and work sheets?

A. Yes, I did.

Q. Were you able to reconcile those documents with the reported receipts on the return?

A. Yes, we were. In each of those years, 1949,

(Testimony of Robert Black.)

1950 and 1951. [396] There were certain minor errors which we adjusted and were able to reconcile those with figures on the return. In 1952 we couldn't reconcile. We were off sixty cents.

Q. In other words, you were able to reconcile exactly for the first three years; for 1952 you were off sixty cents? A. Yes.

Mr. Maxwell: I will ask that the computation be marked for identification as government's exhibit next in order.

The Court: 126(a) marked for identification.

(Jury admonished and morning recess taken at 11:00 o'clock.)

11:15

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, you have in front of you Exhibit 126(a) for identification. Will you state what that is?

A. That is my reconciliation between the figures shown on the duplicate deposit slips, the doctor's work sheets and the tax returns.

Q. Does anything else enter into that computation? A. No. [397]

Q. What did you do then in making reconciliation on the medical receipts reported on the return?

(Testimony of Robert Black.)

Before you answer that question, let me hand you the income tax returns for 1949 and 1952.

A. We found that the medical income on the 1949 return was \$16,152.76.

Q. Now wait a minute. All right—1949. Now the medical receipts per return? A. Per return.

Q. How much? A. \$16,152.76.

Q. That is net income on the return?

A. That is the total receipts.

Q. That is total medical receipts?

A. From business or profession.

Q. It does not include dividend income or interest income, or anything of that sort? A. No.

Q. May I ask what the net income on that return is?

A. From business or profession net income was \$4,668.18.

Q. In other words, the doctor had expenses of what amount? A. \$11,484.

Q. And these were gross medical receipts received from patients as shown on the returns, is that right? A. That is correct. [398]

Q. All right, continue your answer.

A. Now we checked the totals on the duplicate deposit slips. Adding the totals, we have an actual total of \$16,223.26.

Q. All right. Is that from the deposit slips or the work sheets?

A. That is from the deposit slips.

Q. How much did that amount to?

A. \$16,223.26.

(Testimony of Robert Black.)

Mr. Avakian: Your Honor, in the interest of clarity, I am going to ask the Court's indulgence to request that this matter be clarified, because in using the term "deposit slips" implies that is money that went to the bank. I am sure the witness means——

Mr. Maxwell: Counsel—there is nothing mysterious about it.

Mr. Avakian: But the witness is using not deposit slips, but duplicate deposit slips, which include not only money deposited in the bank, but also amount of cash on deposit.

Mr. Maxwell: Your Honor, I think counsel can testify at some other time.

The Court: I think that can be well brought out in cross-examination but the jury and the Court are entitled to know a bit about the procedure as we go along, so try to keep it as simple as possible.

Mr. Maxwell: That is what I am trying to do, your [399] Honor. I can only ask the witness one question at a time.

The Court: Very well, proceed.

Q. These are not the original deposit slips?

A. They are not. These are duplicates.

Q. And you transcribed those duplicates?

A. Yes.

Q. And they were in the doctor's possession, is that correct? A. Yes sir.

Q. Do those duplicate deposit slips contain memorandum of amounts on deposit? A. Yes.

Q. Did you take that into account in this com-

(Testimony of Robert Black.)

putation here? A. Yes.

Q. Do you have any idea of the amount of the \$16,223.26, do your duplicate deposit slips show any amounts not deposited?

A. I think I can find it.

Q. Please do so.

A. According to the figures I have here, for the year 1949, out of that total of \$16,223.26, there was a total of \$6,002.25 which was not deposited.

Q. That includes this figure, is that right?

A. That is right.

Q. I will write down here, "Not deposited." Now then on these duplicate deposit slips showing \$16,223.26, the medical receipts are \$16,152.17? [400]

A. Yes, the doctor told us his work sheets contained information and the monthly totals of deposit slips. Now we checked on the monthly totals of these deposit slips with the doctor's work sheets and we come up with a different figure in March. He had overstated his March total by 50 cents.

Q. His work sheets showed a total?

A. Yes.

Q. What was the total on his work sheets?

A. \$2,087.50.

Q. For the whole year?

A. His total was \$16,152.17.

Q. The same thing as on the return?

A. That is right.

Q. His medical receipts per return and per monthly work sheets, is that right?

A. That's right.

(Testimony of Robert Black.)

Q. Were the work sheets in the doctor's handwriting, do you know?

A. I don't know at this moment. As I recall, this upper part of the work sheet only had figures that was in long-hand writing.

Q. Were figures in ink or typewritten?

A. I believe they were handwriting, but whether pencil or ink, I don't know.

Q. Now in the \$16,223.26 shown in the duplicate deposit slips, were you able to reconcile the difference between the duplicate [401] deposit slips and work sheets of medical receipts on the return for the year 1949? A. Yes.

Q. What adjustments did you have to make to this \$16,223.26?

A. Well, we found that, according to our figures, the doctor had overstated the March total by fifty cents and October an understatement of \$71.

Q. You took the overstatement away and added back the understatement, is that right?

A. That is right.

Q. Were there any other adjustments?

A. Those were all the adjustments for that year. I might state at this time that with reference to that figure \$16,223.26, we were using the doctor's totals on the daily deposit slips, and I think subsequently we may have made adjustments to those totals.

Q. Now did you ever come out with \$16,152.76?

A. Yes, subtraction—you have to do it the other way.

(Testimony of Robert Black.)

Q. In other words, we add 50 cents here, which makes \$16,223.76, and subtract \$71?

A. That is right.

Q. Now did you do the same thing for the years 1950, 1951 and 1952? A. Yes, we did.

Q. All right. What was the amount of medical receipts for the [402] year 1950 on the return?

A. 1950 return showed total receipts of \$17,-184.80.

Q. And were you able to reconcile that to the doctor's records with the deposit slips?

A. By using the same totals that he used for his deposit slips, we came to the same figure.

Q. Exactly the same figure?

A. That's right.

Q. The year 1951?

A. He has total receipts on return for 1951 of \$31,419.24.

Q. And were you able to reconcile that?

A. We were. The totals of the duplicate deposit slips was \$31,423.24.

Q. Four dollars over?

A. And according to his work sheet there was a refund to Helen Macy of \$4, which brings the figures in agreement. For the year 1952 we found total of the duplicate deposit slips and the total on the receipt books agreed substantially with the return.

Q. What was the medical receipts on the return?

A. They were \$49,441.49.

Q. What did you find the totals on his duplicate

(Testimony of Robert Black.)

deposit slips and cash receipt book, I believe you said they agreed?

A. That is right, \$49,441.99.

Q. Fifty cents difference?

A. That's right, fifty cents. [403]

Q. Now on the duplicate deposit slips were names of patients shown?

A. Generally they were, yes.

Q. Were they shown in all instances?

A. No, there were some instances — generally about once a month included on the deposit slips or figure a figure which he identified as cash.

Q. He had that figure on the back of the deposit slip as cash? A. Yes.

Q. And of course you included that amount in your computations?

A. Yes. There were also some other deposit slips, or entries on duplicate deposits, for which we could not determine the name of the patient.

Q. How much of the receipts for 1949 of the \$16,223.76, how much of that was unidentified as to patient's name?

A. We were unable to identify a total of \$2,960.75.

Q. Now the receipts on the deposit slips were \$16,223.76. How much of that could you identify as by patient's name?

A. We were not able to identify \$2,960.75.

Q. For 1950 what was the receipt per return?

A. \$17,184.80.

(Testimony of Robert Black.)

Q. How much could you identify by patients' names?

A. We were not able to identify \$2,423.50.

Q. How about the 1951 return of \$31,431.04?

A. We were not able to identify \$12,969.95. [404]

Q. How about 1952, with receipts on the return of \$49,441.49?

A. For that year on the duplicate deposit slips and miscellaneous cash shown in the receipt books and some other items, we have a total of \$2,398.42 we couldn't identify.

Q. Now these figures, \$2,960.75, \$12,969.95 and \$2,398.42 were the only receipts on the return you could not identify as to the course of patient's names, is that correct?

A. That's right. Every other entry on the deposit slips had the name of the person who made the payment.

Q. Now then, Mr. Black, did you make an attempt to determine by specific patients the amounts which would be included in reported receipts on the return as identified by you? Do you follow my question?

A. No, I don't.

Q. Did you make a computation of the income, amounts paid by the various patients, during the years 1949, 1950, 1951, and 1952?

A. Yes, I made computations.

Q. What did you use to make that computation?

A. Well, we used statements of medical receipts and stipulations and for the year 1951 we had a part of a receipt book covering the period between

(Testimony of Robert Black.)

September 26th and the end of the year. We used that and for all of the years 1949 through 1952 we used the entries on the patient cards, according to our transcription. [405]

Q. Did you also use the transcript of the duplicate deposit slips? A. Yes, we used that too.

Q. When you found a payment on the deposits, that would be reported, is that correct?

A. That is right, and for the year 1952 those items in the receipt book which would also be reported for that particular year.

Q. Would that be true of 1951?

A. No, we can't identify the receipt book in the reported income for the year 1951.

Q. For what period did you have receipt books for 1951?

A. September 26th to the end of the year.

Q. You have available, then, a comparison of reported income for individual patients with unidentified receipts; in other words, receipts not deposited? A. Yes, we do in certain cases.

Q. Would you tell me what you did with respect to that computation?

A. First we transcribed all of the information on the duplicate deposit slips and in the 1952 receipt book on three by five cards, put them in order, patient's name and any information we had concerning payment by the patient, date received and reported.

Q. You identified any deposits on duplicate deposit slips? [406]

(Testimony of Robert Black.)

A. Yes. We also included the names of collection agencies of those receipts, whether a Business and Professional Service. Those were inserted on that card file also, so the card file represented all reported income.

Q. The receipts from collection agency was included on the duplicate deposit slips? A. Yes.

Q. You could identify that as having been reported?

A. Yes. Well, I have here matched the information regarding payments to the doctor against this file. If we could find that item in the file, we knew it was reported. If it was not found in the file, we set that up on the schedule as unidentified income.

Q. In other words, amounts received by the doctor not identified as such on the return, is that correct? A. That is right.

Q. Those amounts could then be included in these figures on the return that you were unable to identify, is that correct? A. That is correct.

Q. All right. You have a schedule of that information comparison? A. Yes, I do.

Q. May I have it.

Mr. Maxwell: Your Honor, I think we can stipulate as to this. I ask it be marked as [407] government's exhibit next in order, whatever the next four numbers are. I offer them for identification.

The Court: Do you wish them marked as one exhibit?

Mr. Maxwell: No, your Honor, I would like them marked as four separate exhibits.

(Testimony of Robert Black.)

The Court: The last offers will be marked for identification as Exhibits 127(a), 128(a), 129(a) and 130(a).

Q. Mr. Black, that form you have before you there, can you say generally what it contains, in regard to the figures you have inserted, the form which is 127(a) for identification?

A. It contains the names of approximately all the patients of Dr. Kelley that we could determine. I notice there are a few missing on it but generally contains all the patients.

Q. Do you know how many names it contains, approximately?

A. No, I don't know, I never counted them.

Q. Does 1150 sound like a good estimate?

A. Yes, it does.

Q. Now I wonder if you will tell us what information you have placed upon those schedules?

A. Yes, we first entered the information that we could determine regarding certain payments to Dr. Kelley.

Q. First is the name, is that right?

A. The first thing is the name.

Q. What comes next? [408]

A. There is a column for stipulations.

Q. That is amounts stipulated by the defendant and the government.

A. That is right.

Q. And the next one?

A. The next column is testimony. The next column is patient card; the next column is fees iden-

(Testimony of Robert Black.)

tified on return; the last column is fees not identified on return.

Q. Now will you give us the first part of the information that you have, his name?

A. His name——

Mr. Avakian: These haven't been offered in evidence or shown to us, your Honor. If he is going to testify to the amounts, I think we should have a chance to look at them.

Mr. Maxwell: I have no objection to counsel looking. I might say he might examine them during the noon recess if that would be satisfactory. They do constitute computations made by the witness. His testimony, of course, is the best evidence. If counsel desires to put them in evidence, that is up to him.

Mr. Avakian: May I ask, through the Court, whether counsel intends to offer them in evidence? If not, that might ease the problem.

Mr. Maxwell: Actually, counsel, I hadn't thought about it. Is it your desire that they go into evidence?

Mr. Avakian: I don't know; I haven't [409] seen them, but if these are simply memorandum of computations of the witness in his testimony, I have no objection to going ahead, with the understanding, of course, we can see them and cross-examine. If that is all counsel has in mind, I am agreeable to going ahead.

Mr. Maxwell: They are marked for identification.

(Testimony of Robert Black.)

Q. What is the first name as to which you made comparison? A. Aubrey Allen.

Q. Tell us what you did.

A. The testimony column has \$250.

Q. What year is this you are talking about?

A. This is 1949.

Q. Give us the exhibit number of that.

A. 127(a) for identification.

Q. Now you have \$250 entry in the testimony column? A. That is right.

Q. And what is your next?

A. I have zero in the fees unidentified on return column.

Q. In other words, you were unable to find any payments identified on the card receipts for payment by duplicate deposit slips?

A. For that year for Mr. Allen.

Q. And the last column, unidentified on the return? A. \$150.

Q. How about the patient cards? [410]

A. Didn't have an entry on them in this particular case.

Q. Do you know whether or not there was a patient card?

A. I believe there was for that particular patient. Apparently it agreed with this figure.

Q. In other words, you say that the patient card would be paid \$250, is that right?

A. Well, I can't exactly say that figure, without checking with the records.

Q. Can you do that during the lunch hour and

(Testimony of Robert Black.)

come back and tell us about that? A. Yes.

Q. What is the next name that you have?

A. The next is Esther Ball.

Q. What do you have?

A. Testimony column, \$43; identified column, zero; fees not identified, \$43.

Q. And what about the next name?

A. Mrs. M. Faghan.

Q. What do you have there?

A. Testimony column, \$388; zero in the identified column; fees not identified, \$388.

Q. And the next name?

A. Evelyn Burke. On the patient card column, \$177.50, and the identified column, \$87.50 and the not identified column, balance of \$90. The next is Irene and Louis Chase. [411]

Q. I think we have gone far enough on the blackboard, so go ahead and state to me the other names you have found for each patient.

A. The next is Louis and Irene Chase. Testimony column, \$476.50; patient card column, same amount; identified column, zero; fees not identified, \$476.50. Ann Collette, patient card, \$308 zero identified; not identified, \$308. Next is Dorothy Cooke; patient card, \$115; nothing in the identified column; \$115 not identified. Next is Buddy Cooper; \$40 on the patient card; fees identified nothing; fees not identified, \$40. Next Annette Crooks; \$15 in the stipulated column; zero in the fees identified; \$15 in fees not identified. Next is Virginia Cubberness; stipulated column, \$296. I have \$26.50

(Testimony of Robert Black.)

from the Nevada Industrial Commission; fees identified, \$150, plus the \$26.50 from the Nevada Industrial Commission, a balance of fees not identified, \$146. Next is Richard David; testimony column, \$235. I have memorandum here of patient card \$350; fees identified is \$50; balance fees not identified, \$185. Next is Catherein Doncette. Patient card, \$35; nothing in fees identified; \$35 in fees not identified. Next L. J. Dossey; stipulation column \$15; identified column zero, fees not identified, \$15. Next is Lilly Engblom; testimony column \$5; fees identified, zero; fees not identified, \$5. Next Mrs. Gene Etchegoin; patient card column \$60; fees identified column zero; fees not identified column, \$60. Next Pete Etchegoin; patient [412] card \$10; fees identified column, zero; fees not identified column, \$10. Next Ben Ferrari; stipulated column, \$55; fees identified column, zero; fees not identified, \$55. Next Rena Ferrari; testimony column \$452; fees identified column, \$342; fees not identified column, \$110.

The Court: I think we will take our recess at this time.

(Jury admonished and recess taken at 12:00 noon.

Afternoon Session—April 4, 1956—1:30 p.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: This perhaps would be a good time to dispose of the matter which the Court took under

advisement. Counsel for the defendant requested the Court, during the course of his examination of the government witnesses Green and Heppner, for an order to direct the production of certain memorandum and notes made by these two witnesses, such memorandum and reports and data being now a part of the file in this case and a part of the government's records. The Court has studied the memorandum presented by the defendant and by the government and apparently has made a much more exhaustive survey of the subject than [413] either counsel. It is the understanding of this Court that none of these memoranda, documents or reports sought by the defendant and requested to be ordered by the court to be produced, were in court at the time either of the two witnesses testified and that none of this date, memoranda or reports were in fact used by either of the witnesses by way of refreshing their memory.

Mr. Avakian: Your Honor, may I state my understanding of the testimony of one of those items. I believe Mr. Green testified, in preparation for the trial, he had reviewed the memorandum.

The Court: That is correct. You may proceed.

ROBERT BLACK

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, I believe you were in the middle of giving us your comparison between identification of amounts on the return

(Testimony of Robert Black.)

and the deposit slips and the stipulations you have on certain patient cards. Now if you recall, this first name in 1949, Allen, I believe, and the witness testified he paid \$250 in the year 1949 and the duplicate deposit slip showed you did not identify this amount in the receipts, is that correct?

A. That is right.

Q. So that there was \$250 not identified as to receipts on the return? [414]

A. That is right.

Q. Now there were reported \$16,223.26 receipts on the return, of which you were unable to identify \$2,960.75, is that correct? A. Correct.

Q. I ask you if you checked, during the recess, to find out about the patient card with respect to Mr. or Mrs. Allen? A. I did.

Q. What did you find that your records show in respect to that?

A. I found no record of the patient card as transcribed.

Q. Now can you explain generally what you have done with respect to your comparison there as to patient card in that connection?

A. If I do not have any patient cards on this sheet in all cases, we do have some information which would tell whether or not we do have a record of patient card on the transcript.

Q. And when did you put down the amounts that were on the patient cards, or when did you first make an entry?

A. Well, on this sheet here we only made an

(Testimony of Robert Black.)

entry in the patient card column when we determined the income figure from that source. In other words, there was testimony or stipulations. If it did not involve the patient card, we did not put an entry in the patient card column.

Q. On the other hand, if the patient cards were involved, what did you do?

A. Then we made the entry in the patient card column. [415]

Q. All right. I don't know where you were. You were in 1949?

A. Yes.

Q. Will you continue, please, and tell the Court and jury what you found with respect to payments made by various patients during that year?

A. I believe the next name is——

The Court: (Interceding) Gentlemen, I would like to make an observation. This accumulation of names which he has before him is rather voluminous, consists of the result of his check and actions in connection with this matter. Unless there is some obvious reason, I do not see why it couldn't be stipulated in evidence.

Mr. Avakian: May I state our position, your Honor? During the noon recess I took as much look at these as I could. I believe there were some 172 files, some of which contained a number of items and some very few. We certainly do not want to be in the position of stipulating that these things here summarized are correct, at least until we have a chance to examine them. I think it is obvious we can't examine them in a matter of minutes or two

(Testimony of Robert Black.)

or three hours, because it means checking them carefully.

The Court: I suggest that that be subject to your right to check them over.

Mr. Maxwell: Your Honor, I think it is [416] primarily up to the defendant whether he desires to stipulate as to the documents.

Mr. Avakian: Your Honor, I do not think we need any stipulation. I think if the witness testifies he has prepared these on the basis of the evidence that has been presented in court, plus evidence that is available in court for our examination and if we are given a reasonable opportunity in preparation to cross-examine to go over these, I think he could properly offer them in evidence. I wanted to make this clear, your Honor, that they go in on that basis. I think it is going to take us a long time to check this because it is voluminous. We have no knowledge, have not seen them until this morning, and I am sure your Honor appreciates the position we are in and I am only asking that we have enough time as would be necessary. We are willing to work until two o'clock in the morning if necessary.

The Court: Perhaps counsel should have that right.

Mr. Avakian: May it be understood, if counsel does not object, that these exhibits, when received in evidence, may be released to us over night, so we may examine them.

The Court: Any objection, counsel?

Mr. Maxwell: No, your Honor, I can't see any

(Testimony of Robert Black.)

reason against it. I think the government also is going to want access in connection with preparation of final calculation.

The Court: I am wasting more time by trying to shorten this. [417]

Mr. Maxwell: I think probably we can get together and stipulate that they might be offered in evidence and be received. I want to inform the Court of the government's position in this respect, and that is that the documents were finally finished last night and that is the reason defendant's counsel have not seen them earlier. We had not seen them earlier either. It is quite obvious to both the Court and jury that the documents are in part prepared from witnesses who testified a few days ago and stipulations about two days ago and obviously they could not be compiled prior to that time. Now as to the availability of the records from which they were compiled, I do not know, but I suppose counsel for the defendant will stipulate he is in possession of such books and records as are in existence and owned by Dr. Wayne P. Kelley. Since these records were compiled from transcriptions of those records, I assume those are all available, counsel.

Mr. Avakian: If there is something on the exhibits which purports to relate to a patient card which is different from what the patient card shows, we might want to see the work papers or transcriptions to see where the error lies.

The Court: Counsel, if you would just make note

(Testimony of Robert Black.)

of this situation and call it to the Court's attention on that point.

Mr. Maxwell: I would be greatly surprised if in the transcript of thousands of entries there [418] may not be one or two typographical errors of some kind. Another situation I would like to bring to the attention of the Court. I do not know how long the cross-examination of this witness is going to take, but his testimony, if these documents are stipulated in evidence, on direct will probably only last five or fifteen minutes and we have only one further witness, Mr. Calkins, an expert witness, and he has computations to make and I know we will not be able to finish this afternoon, so we may have to ask for a recess.

The Court: I do not think we need to keep this witness all day to go over this and if we can get this in, that will give Mr. Avakian and other counsel more time to start work on them. I assume counsel will have some cross-examination.

Mr. Avakian: Yes, I am prepared for cross-examination on other testimony.

The Court: Then make the offer if you are through, counsel.

Mr. Maxwell: Yes, your Honor. Subject to the understanding with counsel, the government offers in evidence Exhibits 127(a), 128(a), 129(a), and 130(a) for identification.

Mr. Lohse: No objection, subject to the understanding.

The Court: The offers will be received in evi-

(Testimony of Robert Black.)

dence as government's Exhibits 127(a), 128(a), 129(a), and 130(a), with the understanding [419] had concerning the defendant's right to examine and later cross-examine.

Mr. Black, I think we have saved you perhaps a sore throat. I would at this time, then, like to ask you if you have totalled up these amounts on Exhibits 127 to 130 inclusive, for each year? Have you done that, sir?

A. Well, I have had tapes run on most of the columns.

Q. Some columns you have had tapes run on, is that right? A. That is right.

Q. Well, we will see what you have. Put that down. (Writes on blackboard)

A. For the year 1949 we have in the stipulation column a total of \$1350.

Q. 1350, all right, stipulation column.

A. In the testimony column we have a total of \$3141, and the patient card column a total of \$6688.50; in the identified column, \$1117; in the last column, not identified column, a total of \$8843.50.

Q. All right, 1950.

A. I do not have totals for it, except the final column, in 1950.

Q. Maybe we can get those this afternoon or tomorrow.

A. Total in the last column is \$14,804.

Q. And for 1951?

A. In the stipulation column total of \$2,981; testimony column, \$3,956; patient card column, \$15,-

(Testimony of Robert Black.)

247.85; and the identified fees [420] column \$5,559.-04, and the fees not indentified column total of \$13,-430.31.

Q. And 1952?

A. In the stipulated column, total of \$1,666.50; testimony column, \$2,948; patient card column, \$8,-153.28; in the fees identified column, \$5,683.13; in the fees not identified column, \$4,485.50.

Q. Now, Mr. Black, during the course of your investigation, did you have occasion to contact a number of Dr. Kelley's patients?

A. Yes, we did.

Q. And did you contact all of his patients?

A. No, we were not able to contact all of them.

Q. How did you secure the names of these patients you attempted to contact?

A. Well, principally from the patient cards. We had the name and dates on the patient card and checked that against the recent telephone books; also sent out letters and got some information from other sources.

Q. Such as?

A. Hospital records; sometimes the patients would refer us to another patient.

Q. Did you contact a number of patients as to whom you had no record of a patient card?

A. Yes.

Q. How would you contact them? [421]

A. We would have to get that name from some other source, as a patient or hospital record.

(Testimony of Robert Black.)

Q. Do you know approximately how many patients you were able to contact?

Mr. Avakian: I think we ought to have this exactly, if at all.

Mr. Maxwell: If we have it exactly, I will be glad to give it to you.

A. I don't have it exactly.

Q. Can you estimate?

A. No. I think we have some figures. I wouldn't be able to look them up. It would be very difficult.

Q. Would you say it was over two or three hundred?

Mr. Avakian: I object to his leading his witness. The witness has answered.

Mr. Maxwell: I am just trying to get an estimate.

The Court: You may answer.

A. No, I think it would be less than that.

Q. Could you say approximately how many patients the doctor had, to your knowledge, during the years 1949 to 1952?

A. The best source I have for that would be to count the names on one of these lists.

Mr. Maxwell: I believe counsel will probably stipulate there are approximately 1150 names.

Mr. Avakian: I will be glad, after going over it, to [422] stipulate to the exact number then.

Mr. Maxwell: There are 46 pages in the list and 25 names per page, that would make approximately 1150.

Mr. Avakian: There are many pages which are

(Testimony of Robert Black.)

blank here. I just wouldn't know—a few pages that have only one name.

Mr. Maxwell: Each page has 25 names.

Mr. Avakian: Your Honor, I suppose we can work this out after we examine them.

Q. Mr. Black, you have probably heard that there has been some testimony in here with respect to currency owned by the doctor at various and sundry times, particularly prior to the year 1949. Now did you make an investigation with respect to such currency? A. Yes.

Q. Did Dr. Kelley give you any information with respect to the currency? In other words, did he give you any leads as to currency?

A. Yes, he did. He said his father and mother knew about it at one time and his brother and sister.

Q. Did you make an investigation into that?

A. Yes, we did. His father——

Mr. Avakian: Just a moment. Is this going to be hearsay?

Mr. Maxwell: I asked him if he made an investigation. He said yes. [423]

Mr. Avakian: He was answering the question, I don't know what he is going to say.

Q. What did you do?

A. With respect to his father and mother, his father died. In respect to his mother, he said she lived back East and we attempted to have some one from our office interview her there. We found that——

(Testimony of Robert Black.)

Mr. Avakian: Unless this is the witness' own knowledge, we object as being hearsay.

Q. Did Dr. Kelley tell you where his mother was at that time?

Mr. Avakian: May we have the time and place?

Q. Whatever time it was you had the interview.

A. As I recall, the interview we had with Dr. Kelley was February 4th. I believe at that time he said that she was in a hospital back in Connecticut.

Q. Did he say she was mentally incompetent at that time?

A. I do not recall whether he said at that time or whether I heard it some place else.

Q. Any way, what did you find with respect to her condition as a result of your investigation?

A. Well, we received back a letter from his mother's doctor saying she was incompetent to answer the questions.

Q. Now you said that the doctor told you that the currency had been in the custody of his brother and sister?

Mr. Avakian: No, your Honor, there was no such testimony. [424]

Mr. Maxwell: I believe there was such testimony.

Mr. Avakian: No, the witness has not testified that Dr. Kelley said the currency was in the custody of his brother and sister, I am sure of that.

Q. Mr. Black, did you so testify earlier?

A. I believe I did; I meant to.

Mr. Avakian: His testimony was that Dr. Kelley

(Testimony of Robert Black.)

told him his sister knew about it and just now he said his brother and sister knew about it.

Q. What was the testimony?

A. Well, during the first conversation with Dr. Kelley——

Q. What date was that?

A. That was November 6th—he told us that he had a loan on his Ford and the reason for that was his brother and sister had custody of his currency.

Q. Now did you make an investigation with respect to Dr. Kelley's statement to you that his brother and sister had custody of his currency?

A. Yes, I did.

Q. What did you find in your investigation?

A. Well——

Mr. Maxwell: I will withdraw the question.

Q. What did you do?

A. We again wrote letters to our office to interview his brother [425] and sister and received a reply——

Mr. Avakian: I object to the contents of the reply. His brother and sister testified here. Anything else is hearsay.

Mr. Maxwell: I think his brother and sister so testified, yes, that they had no custody of his currency.

Q. Now did you make any additional investigation with reference to Dr. Kelley's alleged currency?

A. We checked immediate sources for financial

(Testimony of Robert Black.)

statements from his bank and loans. We did not find any reference to financial statements for the doctor for the period prior to 1946.

Q. Do you recall whether or not the doctor ever made a statement to you with respect to financial statements at any time?

A. I don't recall that he did.

Q. Did you do anything else in connection with the investigation of the doctor's currency?

A. Well, we again tried to contact one of his former wives he was married to during the former years. Again we wrote letters and received a reply——

Mr. Avakian: Just a moment—we object to the contents of the reply. One of the former wives is under subpoena and we have her to testify. I don't think we should have hearsay.

Mr. Maxwell: Your Honor, please, counsel has insisted that the government furnish evidence in this trial as to investigations and cash on hand. This witness is not testifying as to [426] the truth or falsity of the replies given, but merely the investigation that was made and that he received replies which were negative.

Mr. Avakian: We object to that statement as to what the replies contained. I ask that counsel be admonished from making such comments.

The Court: That portion of counsel's statement that the replies were negative will be stricken and the jury will be advised not to consider that as part of the evidence. There is no other evidence here

(Testimony of Robert Black.)

as to what the replies were. I believe, counsel, that if your question elicits only such information as you have recited, you are on safe ground. If it goes any further, you are not.

Mr. Maxwell: That is all I intend to elicit, your Honor.

Mr. Avakian: We do not object to the financial statement, but we do object to this witness giving, even by implication what testimony would be offered by witnesses under subpoena.

The Court: He hadn't.

Mr. Avakian: He was about to, your Honor.

The Court: You can object when he starts.

Mr. Maxwell: We do not intend to start, if the Court please. [427]

Mr. Avakian: Sometimes we have to object, because it is too late when he started.

Q. I believe, Mr. Black, you were saying that you sent inquiry with respect to former wives?

A. Yes, sir.

Q. And you were about to say that you received some replies. I wonder if you could say what the nature of those replies were?

Mr. Avakian: Objected to as calling for hearsay; no showing it is unavailable by witnesses.

Mr. Maxwell: What witness are you referring to?

Mr. Avakian: Well, you have called by name one of the former wives and you can put her on the witness stand. Let us not have hearsay through showing as to what she would say. Put her on the stand so I can cross examine.

(Testimony of Robert Black.)

Mr. Maxwell: I don't intend to bring in hearsay. I do intend to show the investigation made with respect to leads given by Dr. Kelley.

Mr. Avakian: The fact he made inquiry shows investigation was made. As to what that produced, that is something to be developed by admissible evidence.

The Court: I think, counsel, you are satisfied of the leads?

Mr. Avakian: I take it they made a start. I do not think they proved anything, except they made an investigation.

The Court: Apparently you are satisfied that an [428] attempt was made of the leads?

Mr. Avakian: I am satisfied they made some effort, your Honor.

The Court: I do not think, counsel, the contents of the report should be received at this time. It does appear to be hearsay.

Mr. Maxwell: Yes, your Honor, and I will not try to get the contents. I just want to know if he received any additional information with respect to cash on hand or currency as a result of his inquiry.

Mr. Avakian: That is a left-handed way of getting in the same thing.

Mr. Maxwell: I think that is perfectly proper to go before the jury by this witness.

The Court: You make a fresh start. Reframe your question.

Q. Did your inquiry with respect to the former wives, Mr. Black, develop any additional or any information with respect to cash on hand?

(Testimony of Robert Black.)

Mr. Avakian: Objected to as calling indirectly, and by conclusion, for contents of some communication; apparently hearsay.

The Court: Answer yes or no.

A. Yes.

Mr. Maxwell: Now I don't exactly know what the answer [429] was to the question that was objected to.

Mr. Avakian: The answer was yes, your Honor. Your Honor instructed him to answer yes or no.

The Court: He answered yes to the question if he was given additional information.

Q. Did it give you additional information, Mr. Black, that there was or was not any such currency on hand?

Mr. Avakian: Objected to——

The Court: That question has been answered yes.

Q. It has been answered yes—is that the way you understand it, Mr. Black? Perhaps we can reask the question and we will undoubtedly get an objection again; perhaps we can make it a little clearer. Mr. Black, did you receive reply to any inquiry with respect to the doctor's former wives, is that right? A. Yes, I did.

Q. Did that reply indicate information that the doctor did have currency on hand in any substantial amount?

Mr. Avakian: Objected to as calling for the witness' conclusion as to the contents of a letter. Hearsay. We object to it.

The Court: Objection sustained.

(Testimony of Robert Black.)

Q. Did the reply contain information as to the existence of currency?

Mr. Avakian: Same objection. Your Honor, to the extent it may relate to whether he got additional information, we [430] will not object. Any attempt to characterize the nature of the information calls for hearsay.

Mr. Maxwell: Your Honor, I think the reply, as to whether it did or did not contain information as to the existence of currency; in other words, whether the reply was affirmative that currency did exist, or negative that currency did not exist, would be admissible, not to prove whether or not currency did or did not exist, but whether, as a lead and in order to establish a lead, I think we have to have the witness testify to what leads he received. Now, if counsel does not want to know what leads he received—I do not see any way going into it any other way.

The Court: That is not being offered, as I take it, for any fundamental value at the moment. The offer is for the purpose of showing what this agent did.

Mr. Avakian: What he did was to write to the former wife. As to what she said, that is what counsel is trying to get in, what she said. That is hearsay until she comes to the witness stand.

The Court: Let us ask if he received any further leads from the contents and let it go.

Q. Very well. Did you receive any further leads from the contents of the correspondence?

(Testimony of Robert Black.)

A. No. [431]

Q. Now in connection with your investigation into this currency, what else did you do, Mr. Black, if you can recall?

A. I recall checking the court records on his former divorce to see if they had any connections to his financial status at the time of the divorce.

Q. Did you examine his early income tax returns? A. I personally did not.

Q. Did Mr. Green do that? A. Yes, he did.

Q. As I recall, you testified Dr. Kelley stated to you that he had a mortgage on his Ford automobile in 1946? A. So he said.

Q. Did you make investigation to find a record of that mortgage?

A. Yes, I did. I checked with the company that sold him the automobile. I found he paid cash for it within a short time. I also checked the title mortgage file. I didn't find a record of a mortgage of the Ford. However, there was a record of another title mortgage.

Q. Was that on an automobile?

A. As I recall, it was on a Mercury.

Q. Mr. Black, was there some adjustments which should be made on these figures we have on the board for 1949, 1950, 1951 and 1952, with respect to not identified on returns?

A. Yes, there is. There should be an adjustment to a number of [432] columns there.

Q. Can you tell me what it is?

A. I do not know if I mentioned it. In addition

(Testimony of Robert Black.)

to the testimony, stipulations and patient cards, we have another source of income which would be receipt books for 1951, and we found that during the last few months of 1951 there was income of \$1,695, which was not included in those figures which I have already given and which——

Q. Will you break that down?

A. We will eliminate from the figures on receipt book income, which we had picked up in column stipulation, testimony and patient cards, and we also eliminate any income indicated by the receipt book for the year 1951, which was in identified receipts by deposit slips.

Q. And does that result in adjustment of figures on the board? Should there be any change?

A. Yes, for the year 1951 it would add to the not identified on return column the total of \$1695.

Q. That should be added on to this 13 thousand dollars?

A. That's right.

Q. Anything else?

A. We made adjustments as you have there for unidentified on return and also made some other deductions for income which the doctor reported, which perhaps should not have been reported.

Q. How do you mean that? Explain. [433]

A. There was some income he received in the year 1948 which he actually reported in 1949. We deducted that figure and did the same thing there each year.

Q. In other words, he would receive income at the end of 1948 and be reported in 1949?

(Testimony of Robert Black.)

A. That's right.

Q. And he would receive income in 1949 which he would report in 1950? A. That is right.

Q. So you then shoved back in 1949 and shoved 1948 income out of 1949? A. Yes.

Q. You made that adjustment then for each year, I take it? A. Yes.

Q. Please tell me what that adjustment was.

A. The year-end adjustments, we have a deduction for the year 1949 of \$86.50.

Q. In other words, 1949, \$86.50. All right, 1949 year-end figure should be \$89 less, you say?

A. \$86.50.

Q. The year 1950?

A. For that particular item there was no adjustment for 1950.

Q. 1951? A. \$32.50.

Q. More or less? [434] A. Less.

Q. All right, 1952? A. \$600.50.

Q. Less?

A. Less. Giving you those figures, that is the total deduction. In other words, we did not date back to the previous year.

Q. You did not date back?

A. That does not include any amount set back.

Q. In other words, 1950, received late in 1950, which was reported in 1951, you took it out of 1951 receipts, but didn't put it back in 1950 receipts, is that right?

A. Yes, that is true. Now, there are some other adjustments. First, the figure I mentioned previ-

(Testimony of Robert Black.)

ously, item of \$750, he received as repay from George McKaig.

Q. Received during the year 1952?

A. 1952. He had reported that with his medical receipts, so we deducted that.

Q. What else?

A. During the year 1950 he overstated one of the totals to the extent of \$180.

Q. One of the totals of what, Mr. Black?

A. That would be one of the totals in the duplicate deposit slips. He had it entered \$425. According to our figures, it should have been \$245. Also on his receipts on the collection [435] pages, there were some items which he reported as he received them from the patient, and also reported the income some time later when he received the balance in the check from the patient. That amounted to \$3 in 1949, 1950 a total of \$10, total of \$101.05 for the year 1952.

Q. Those are the full adjustments?

A. Those are the full adjustments.

Q. Do you have any idea of the number of items, patient names, which you made in the years 1949 to 1952?

A. That again would be a guess. We just finished this list.

Mr. Avakian: That is the same item we were going to stipulate on after we counted them?

Mr. Maxwell: No.

Mr. Avakian: We will stipulate, after counting, anything on the schedules.

Mr. Maxwell: You may inquire.

(Testimony of Robert Black.)

Cross Examination

Q. (By Mr. Avakian): I want to make sure I understand these year-end adjustments that you made, Mr. Black. You said there was \$86.50 for 1949, for example?

A. Yes. \$86.50 was four different items.

Q. Without giving me the items, would you explain what this adjustment was?

A. Yes. They are items which, according to the information we were able to collect, he actually received in 1948 but appeared [436] in 1949; it was included in 1949 income tax.

Q. There was no adjustment on that account in 1950?

A. No deduction.

Q. In other words, in 1950 he didn't report any item which he had received in 1949?

A. None we were able to determine.

Q. Do you have Exhibit 127 before you? That is the 1949 schedule.

A. Yes.

Q. My notes indicate that the very first item which you read and which Mr. Maxwell wrote on the board at the time, was Aubrey Allen, \$250, is that right?

A. That is right.

Q. And you showed that as to the \$250, according to the testimony, as having been paid in 1949, is that right?

A. That is the way I have it.

Q. And you show another column, fees identified on returns, was zero?

A. That's right.

Q. And then you put the full \$250 in fees not identified on returns, is that correct?

A. That is right.

(Testimony of Robert Black.)

Q. As to the testimony, do you refer to testimony which was given with regard to the check stub dated December 28, 1949 for \$250, which is the item in Exhibit 95? [437]

A. As I recall, this is on testimony of Mr. Allen. There were no amounts on the card. I was able to get these particular figures only from Mr. Calkins, who had seen the exhibit just prior to the time the witness brought it into court.

Q. The exhibit is before you. Mr. Allen testified in person, you recall that, don't you? A. Yes.

Q. And the only document he presented on this \$250 item was that check stub, was it not?

A. I don't recall every detail of his testimony.

Q. At this time are you able to tell me, of your knowledge, the information which led you to classify that \$250 as a non-identified item?

A. Yes, we were not able to identify it on the duplicate deposit slips for the year 1949.

Q. And I take it you did not identify it for 1950 either, because you said you made no adjustment on account of items received? A. No.

Q. You found no record in Dr. Kelley's records anywhere of the receipt of that money, is that correct? A. Yes.

Mr. Maxwell: Do you want to offer this in evidence?

Mr. Avakian: I would like to show it to the witness.

Mr. Maxwell: I object to showing the witness any document [438] not properly identified and not in evidence.

(Testimony of Robert Black.)

Mr. Avakian: It will be identified, your Honor.

Q. Mr. Black, I am going to show you what purports to be a duplicate receipt book, and ask you if that is one of the duplicate receipt books which the doctor and Mrs. Kelley turned over to you and Mr. Green during the course of your investigation?

A. It appears to be. May I refer to my notes?

Q. Yes, I would like to have you verify that for sure. Mr. Lohse called my attention to the fact that this is actually a duplicate deposit book, is that correct?

A. Duplicate deposit book.

Mr. Maxwell: I ask the document be marked for identification.

Mr. Avakian: Before that, may I make the statement I believe the witness, when he examines it, will testify he has made a transcript of this.

The Court: I think it should be marked.

Mr. Avakian: The trouble is we need it all through the trial. May it be returned in our custody during the course of the trial, rather than the clerk's?

Mr. Maxwell: I strongly object.

The Court: Let us mark it then, Mr. Clerk, at this time so you both can use it. This is defendant's Exhibit E and put a number after it, showing it is for identification, so it will be E-1. [439]

Mr. Avakian: For the record, may it be noted on the cover of that duplicate deposit book there is a notation, "January 1948 to June 1950."

Q. Mr. Black, I will call your attention to Exhibit 123, which Mr. Green testified was a receipt obtained by yourself and Mr. Green from Dr.

(Testimony of Robert Black.)

Kelley when you returned certain records, and ask you if you find on that typewritten receipt a reference to a duplicate bank deposit book for January 1948 to June 1950. A. Yes, I do.

Q. And this duplicate deposit book which I have shown you, Exhibit E-1 for identification, is the book which you had and which you returned to Dr. Kelley on December 17, 1953, isn't it?

A. Yes.

Q. Now, calling your attention to the page in this book which I am now opening for you, do you find a reference there in January, 1950, under the column of cash to an item of Allen, \$250?

A. Yes.

Q. And by referring to the next page, do you find that the total of that check, and the various checks listed with it, \$344, is included in the January receipts?

A. It is included in the figure 912.

Q. And Mr. Black, now that I have called this to your attention, isn't it true that this \$250 Allen item, which was the first item on Exhibit 127, was included in Dr. Kelley's income tax return [440] as a part of the receipts in January of 1950?

A. That item was.

Q. And the check stub is dated December 28th, is it not? A. That is true.

Q. You missed the fact, then, that this was a year-end check which was included in next year's income, isn't that correct?

A. Yes. As I said before, we didn't see that check or stub until just now.

(Testimony of Robert Black.)

Q. But in working over the duplicate bank deposit book, you didn't put that item in the right place and use it in the right way?

A. No, that should have been an identified item.

Q. I haven't time to go through others. We will defer that until later, so I am not questioning you further regarding these three exhibits, Mr. Black. I believe you testified that you received your assignment on the Kelley matter on September 22, 1953, is that correct? A. Yes.

Q. How do you remember that date?

A. I looked that up on the assignment.

Q. Did you know at that time that Revenue Agent Green was working on the matter?

A. Not until I got the assignment.

Q. Did you almost immediately find out who the Revenue agent was? [441] A. Yes.

Q. Did you talk to him then?

A. I talked to him within the next, I don't know, within the next couple of weeks.

Q. When you talked to him within the next couple of weeks, did you discuss any procedure as to the manner in which you and he were going to discuss this investigation?

A. No, I don't recall discussing the procedure at all.

Q. Was there any discussion with regard to whether he was going to go ahead on the work?

A. Yes, I believe we did come to that conclusion, we decided Mr. Green was to continue with his audit.

Q. And then was it understood that he was to

(Testimony of Robert Black.)

go out and get patient cards and start working on them? A. I understand he did that.

Q. Was that part of your discussion with him?

A. No.

Q. He did that on his own, is that right?

A. Yes.

Q. You are a Special Agent for the Internal Revenue? A. That is right.

Q. Does a Special Agent have a particular type of work he is supposed to do?

A. Well, yes, we work principally on fraud cases.

Q. And in the conduct of an investigation, do you, as Special [442] Agent of the Internal Revenue, have any joint division of work that you try to follow?

Mr. Maxwell: We object to this line of questioning as immaterial.

The Court: The witness may answer. Objection overruled.

A. Well, theoretically we do. As a matter of fact, I think we work everything together.

Q. Sort of a hand in hand proposition, is it?

A. Yes.

Q. You testified, Mr. Black, that you had a conference with Mr. Green, Mr. Lohse, Mr. Lyon and myself, and it was stipulated the date of that was June 9, 1954. Do you recall that conference?

A. Yes, I do.

Q. Do you recall the matters which were discussed? A. I recall some matters, yes.

(Testimony of Robert Black.)

Q. Did you make a memorandum of what was discussed then?

Mr. Maxwell: Objected to as immaterial.

The Court: Objection overruled.

A. Yes, I did.

Q. Have you referred to that memorandum to refresh your recollection in preparation for your testimony here? A. Yes, briefly.

Q. About how long ago did you do that? [443]

A. Oh, sometime within the last few weeks.

Q. Do you recall that shortly after that conference I wrote you a letter, in which I set forth, item by item, my understanding of the things which were discussed?

A. Yes, I recall the letter, yes.

Q. Do you have that letter?

A. Not with me, not here.

Q. You didn't answer that letter, did you?

A. I don't recall, but I believe I answered every letter I got from you.

Q. Do you recall whether there was anything stated in my letter with regard to the items discussed, whether the record was incomplete?

A. What do you mean—whether or not you answered every question that we asked?

Q. Did I set forth in my letter all of the items which were discussed and the items which were to be a subject of further information?

A. I wouldn't be able to say right at the moment whether you mentioned every subject. I know you did mention several subjects.

(Testimony of Robert Black.)

Q. Mr. Black, you testified on your direct examination, that at this conference on June 9th, you asked us for more information regarding cash on hand and you never got any. On what do you base your testimony that that matter of cash on hand was discussed at that time? [444]

A. Just a recollection.

Q. Do you have any notes which show that?

A. Well, I don't have my notes right here at the present time.

Q. Would you refer to your notes and would you refer to the letter which I wrote you, setting forth my understanding of the items discussed, and will you look to see whether you wrote me in answer to that letter and see if you can get all that by tomorrow morning?

Mr. Maxwell: Your Honor, we object to that.

Mr. Avakian: I am entitled to cross examine on this statement, which I think is a damaging statement made by the witness.

Mr. Maxwell: You are entitled to cross examine on the offer. To go and do a lot of research is another question entirely.

The Court: It seems to me the purpose of the cross examination is to determine the credibility of the witness. You can do that by cross examining the witness and not by bringing in everything that might concern it.

Mr. Avakian: When the matter was raised on direct examination, a statement was made that we failed to produce certain information that was re-

(Testimony of Robert Black.)

quested. I would like to make a demand at this time for the production by the government of the letter which I wrote to Mr. Black on June 14, 1954. I appreciate that [445] they can not produce it this moment, but I think it is reasonable, if there was a communication which described the information, the letter itself should be produced here. I can produce my carbon copy of it, but I think it is important to show he got the letter.

The Court: The demand will be refused.

Mr. Brown: Your Honor, please, so there will be no question tomorrow, this witness is not being directed to do the things Mr. Avakian asked him to do, is that correct?

The Court: That is the Court's order.

Mr. Avakian: Your Honor, please, may I approach the bench with counsel?

(Conference at bench between Court and counsel.)

Mr. Avakian: I will ask, your Honor, that the carbon copy of my letter, dated June 14, 1954, purporting to be letter from me to Mr. Black, be marked for identification.

The Court: It will be marked Exhibit F-1 for identification.

Q. Mr. Black, I will ask you to read that letter, carbon copy, and see whether it refreshes your recollection or not as to whether you received that letter from me, the original of that?

A. I remember receiving the letter, yes, sir.

(Testimony of Robert Black.)

Q. And does the reading of that letter refresh your recollection as to the items that were discussed? A. Yes. [446]

Q. And isn't it true, Mr. Black, that there was no discussion at that conference about the item of cash on hand?

A. Reading over this, I see no reference to that particular subject.

Q. Isn't it possible, Mr. Black, in testifying that that item was discussed at that conference on June 9th, you may have been confused with items which may have been discussed at some other conference?

A. I doubt it, but there is always a possibility that it could have occurred at some other conference, yes.

Q. Do you recall that you testified that on February 4, 1954, there was a conference which was stenographically transcribed, attended by Mr. Green and yourself, Mr. Lohse and Dr. Kelley and the stenographer? A. Correct.

Q. And your testimony on that matter was based on your memory, was it? A. Yes.

Q. You stated on your direct examination that at that conference Dr. Kelley said that his sister knew of the currency in Hubbardsville?

A. Yes.

Q. And is it still your testimony that Dr. Kelley said that at that meeting on February 4th?

A. Yes. [447]

Q. Are you quite positive on that, without having to refresh your recollection?

(Testimony of Robert Black.)

Mr. Maxwell: Counsel has a copy of that statement.

Mr. Avakian: I want to be fair to the witness. If he would like to look at it, I would be happy to have you produce it. If he is sure, wants to testify without it, that is all right.

Mr. Brown: He has answered the question twice.

The Court: Unless you desire to impeach, I think he has answered the question.

Q. Let me ask you this, Mr. Black, isn't it true that what Dr. Kelley said about his sister at that time was this, that after you asked him if anybody else, other than his mother and father knew about this currency, his answer was, "Unless my sister knew about it," and if you like, I will show you the statement. Do you have it here?

Mr. Brown: This is the copy.

A. Do you want me to answer that question now?

Q. Would you look at the statement first?

A. As I recall, there were two references to sister in that statement, one as you said, also another reference to the sister under which he said she knew.

Q. I will call your attention to page 8 first and ask you, after you have looked at that page, if it is not true that you asked the doctor if any other person was aware of the currency other [448] than his father and mother and his answer was, "Yes, my sister knew about it."

Mr. Maxwell: If this is an attempt to impeach the witness, no proper foundation has been laid.

(Testimony of Robert Black.)

Mr. Avakian: It isn't impeachment, it is testing his credibility.

The Court: I think he may refresh his memory.

A. May I look over this?

(Jury admonished and afternoon recess taken at 3:00 o'clock.)

3:15 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand on further

Cross Examination

Q. (By Mr. Avakian): Mr. Black, have you now examined the entire statement?

A. Just partially, not the entire statement.

Q. Did you find any other statement?

A. Yes, on page 8, you refer to letter here, says, "Unless my sister knew it," refers to cash. On page 12 the question was, "You say your father and mother had no occasion to count it or check it"; the answer that he gives to that: "I don't know of any reason why they should, my sister knew about it."

Q. So on one question he said, "unless" and another he said, "My sister knew about it"? [449]

A. That is correct.

Q. Then you testified Dr. Kelley said the money had been in the custody of his sister. Will you look on page 8 and see if you asked him that question and tell us what his answer was?

(Testimony of Robert Black.)

Mr. Maxwell: I don't believe the witness' testimony in respect to custody was in connection with the conference on February 4, 1954.

Mr. Avakian: Since I was not at any other conferences, I don't know where it was. Let me reframe the question.

Q. At that February 4th conference, did you ask Dr. Kelley if the money had ever been in the custody of his sister? A. Yes.

Q. And what was his answer?

A. He said no, she wasn't at home all of the time, "My sister was away at college a good part of the time."

Q. When you asked if the money was in his sister's custody, do you recall now he said no?

Mr. Maxwell: Object to that; the answer was just read.

The Court: Objection sustained.

Mr. Avakian: I will withdraw the question, your Honor.

Q. Mr. Black, since at the moment at least we have only my carbon copy of this letter of June 14th, I am going to get close to you. We will both try to keep our voices up. By reference to this carbon copy again, Exhibit F-1 for identification, at that conference on June 9th, did you ask that we, as Dr. Kelley's representatives, [450] make an analysis of the business expenses and check the records and furnish that to you?

A. I believe I did.

(Testimony of Robert Black.)

Q. Was that done? Did Mr. Lyon make such analysis and furnish it to you?

A. Of the expenses, yes, he did.

Q. And then did you ask that the work sheet attached to the taxpayer's return, copies of their returns, be made available to you?

A. That is right.

Q. Was that done? A. Yes.

Q. Did you ask for bank statements and cancelled checks for 1946 and 1947 be made available?

A. I did.

Q. Was that done? A. Yes.

Q. Did you ask that we prepare a recital of checks any person had for each year from 1946 to 1952 inclusive? A. Yes.

Q. Was that done? A. That was done.

Q. Did you ask that we prepare and turn over to you a schedule of insurance and endowment policies, showing dates, amounts, annual premiums and benefits received each year? [451]

A. We asked for that.

Q. Was that done?

A. I don't think all of that was done, but I think he did furnish as much as he could.

Q. Mr. Lyon worked up all of that and I believe has turned it over to you?

A. He worked on the figures, yes.

Q. And I stated in my letter the policies would be available to you, is that right?

A. That is what your letter states, yes.

Q. And you asked that we prepare and turn

(Testimony of Robert Black.)

over to you schedule showing the date the airplane purchases were made? A. Yes.

Q. Was that prepared and turned over to you?

A. Yes, I believe it was.

Q. Did you ask, on the June 9, 1954, conference, that we give you information regarding stocks owned by Dr. Kelley in the Federal Gas & Water Company? A. Yes, we did.

Q. Did I furnish you that information in this letter of June 14th?

A. Yes, you stated the information which you received from Dr. Kelley.

Q. Did you ask at that conference for us to let you know whether or not Dr. Kelley had engaged in private medical practice [452] while serving in the army? A. Yes.

Q. Did I give you that information in this letter? A. Yes.

Q. Did you ask us to try to get information to you, regarding the amount of pending deposit in account No. 7923 at the National Bank of Hamilton in Hamilton, New York?

A. I don't recall whether that question was at the conference or during telephone conversation between myself and Mr. Avakian shortly after the conference. It was on one of those two occasions.

Q. Did my letter of June 14th set forth what we understood Dr. Kelley's impression to be regarding that account and state Mr. Lyon would try to develop further details for you?

A. That is correct.

(Testimony of Robert Black.)

Q. Was that done? A. Yes, that was done.

Q. And at that date did you raise the question of whether Dr. Kelley's patient cards would be made available again? A. Yes.

Q. Did I state in my letter of June 14th I would like to defer that matter until we had made a full analysis of that, and if we did turn them over to you, we wanted to have some understanding which would avoid injury to Dr. Kelley's patients, due to large scale circularizing of his patients? [453]

A. Yes.

Q. And at that conference did you ask whether we would be willing to have Dr. Kelley sign the typewritten transcription of the question-answer statement which was taken February 4, 1954, with he and Mr. Lohse? A. Yes.

Q. And in my letter did I state we would like to defer that until the accounting work had been completed by Mr. Lyon? A. Yes.

Q. Do you recall some months later, after you had been transferred back to San Francisco, I talked to you on the telephone and asked you whether we should make arrangements to get together to have Dr. Kelley sign the statement?

A. I recall a telephone call from you in San Francisco. I don't recall that we made any arrangements to get together.

Q. That is right. I am just asking if you recall the conversation in which I asked you whether we should make arrangements.

A. That I do not recall at the moment.

(Testimony of Robert Black.)

Q. You recall the matter was discussed in some form or another?

A. As I say, I don't recall whether you suggested we get together or not. The only thing I remember at the moment was I had been transferred to San Francisco. I can't tell you any more about that conversation right at the moment.

Q. Do you recall, Mr. Black, that I stated to you——

Mr. Maxwell: That has been asked and answered, I believe. [454]

The Court: He can't recall any more of that conversation.

Mr. Avakian: I would like to refresh him on it, your Honor.

Q. Do you recall I stated to you, since you and I were both in San Francisco and Dr. Kelley was in Nevada, that it might take some time to try to arrange for all three of us to be in one place at the same time and you answered, "Well, send your report on" and it really wasn't too important any more whether he signed or not.

A. I really don't recall the first part of that.

Q. Do you recall the last part?

A. I believe I did tell you I sent my report in.

Q. Do you recall, Mr. Black, anything else that you asked us to provide at that conference on June 9, 1954 in Reno, other than the items which we have just mentioned?

A. Well, as I said before, I was under the impression we had asked for additional details regard-

(Testimony of Robert Black.)

ing cash on hand. Without referring to my own notes on it, against your letter, I would say it is possible that that particular request was made since the letter came.

Mr. Avakian: May I ask permission, at the convenience of the clerk, some time or other a copy be made, at our expense, of Exhibit F(1) for identification, for our file? [455]

The Court: The Court will direct a copy be made for Mr. Avakian.

Mr. Maxwell: May I, at this time, ask that copy of the statement be marked for identification, which was used to refresh the witness' recollection on the questions?

Mr. Avakian: We again need these documents during the trial. May I suggest that the original typewritten copy, which I am sure Mr. Maxwell has, be marked for identification if he desires to have it done?

Mr. Maxwell: I would like to have the document marked used to refresh the witness' recollection.

The Court: It may be marked for identification.

That will be defendant's G-1 for identification.

Q. You testified that your recollection was that at this conference on February 4, 1954, which was stenographically transcribed, Dr. Kelley told you that all of his bank accounts had been listed on the net worth statements which are in evidence here as Exhibit 121. Did I understand your testimony correctly in that record? Is that your testi-

(Testimony of Robert Black.)

mony? A. Yes.

Q. I will ask you to look at Exhibit G-1 and tell me what Dr. Kelley's words actually were?

Mr. Maxwell: I believe that will be reading from a document not in evidence.

Q. Does that refresh your recollection as to what Dr. Kelley [456] told you?

A. It says here, "I am almost positive that I listed on the net worth statement. Remember that is to the best of my memory."

Q. In all these conferences, Mr. Black, you were asking Dr. Kelley questions, did you give him a list of items you wanted to question him about, so he could try to gather the information, or did you just call him in and start putting the questions to him?

A. We didn't give him a list of questions.

Q. The other conversations with him were not stenographically transcribed, is that correct?

A. That is correct.

Q. In all of these conversations, when you say he said this or that, isn't it true he was testifying, or stating to you at that time, that he thought it was this way, or to the best of his memory it was that way?

A. I believe that if he used that expression, I would have that in my notes.

Q. From your recollection you don't remember that he had said this, during the questioning, to the best of his memory they were all listed, you don't recall about that, do you?

(Testimony of Robert Black.)

A. There may be some other questions here, I don't know whether there is or not.

Q. Possibly there is. We will not take the time to look at it [457] now, but you can look for it later on. I am sure your counsel will give you the original. You also testified that in February, 1954, Dr. Kelley told you that he maintained the medical records himself and took them home. Do you recall, Mr. Black, in your various discussions with Dr. Kelley, whether he told you that at one period he followed the practice of keeping the medical records at home because he didn't have a secretary at the office, and other periods, when he had a secretary at the office, some of the work was done there?

A. I don't recall that. As I recall, he said that the records were kept at the office except for filing and they were taken home for a period of a week or two.

Q. What did Dr. Kelley tell you at that conference, if you can remember, as to who prepared the tax returns?

A. This was in February, 1954?

Q. Yes.

A. He said he and his wife prepared the returns and prepared them from deposit slips and work sheets.

Q. He also said, did he not, in connection with that answer, that Mrs. Kelley did 99 per cent of the work?

A. Yes, he did. He said Mrs. Kelley did most of the work, 99 per cent of the work on the returns. I believe he also said—I don't know whether referring to returns or deposit slips—but he said that

(Testimony of Robert Black.)

he checked the figures.

Q. And he told you, did he not, in these various conferences [458] you had with him, that the reason why certain assets were carried in the names of his brother and sister and mother until 1950 was that he was having financial difficulties with his first wife?

A. That was brought out in one of these conversations.

Q. He told you that right from the beginning, didn't he? A. I believe he did.

Q. And isn't it a fact that you found, in your investigation, that in 1950, after he had reached a final settlement of his financial difficulties with his first wife, that these various assets, which had been carried up to that time in the name of his brother and sister and mother, were transferred in his own name?

Mr. Maxwell: Objected to as hearsay.

The Court: If the witness knows if they were, it is not hearsay. You may answer.

A. The amounts were transferred into Dr. Kelley's name, I am not sure in 1950 or possibly 1951.

Mr. Maxwell: I am going to ask that be stricken as hearsay.

Mr. Avakian: It is in evidence.

Mr. Maxwell: The quitclaim deed can speak for itself. This witness' testimony is precisely the same thing counsel objected to on direct examination.

The Court: The deed speaks for itself and is in evidence. [459]

Q. I will show you plaintiff's Exhibit 59, which

(Testimony of Robert Black.)

is a certified copy of a quitclaim deed from Winfield O. Kelley and Cora R. Kelley to Wayne P. and Lois Kays Kelley, shown recorded on April 17, 1950, and I will ask you if you can tell us whether that represents the deed on Dr. Kelley's house?

Mr. Maxwell: It has been read in evidence and read to the jury.

Q. Did you examine fully that particular document, or the original, on file in the recorder's office, in connection with your investigation? A. Yes.

Q. Are you satisfied that is the deed on Dr. and Mrs. Kelley's house? A. Yes.

Q. Did you also make an investigation as to what happened to the bank accounts that were carried in the names of Dr. Kelley's sister and brother and mother? A. We did, yes.

Q. And did your investigation show to you that in 1950 those funds were transferred into Dr. Kelley's name?

A. Without having those bank accounts, I couldn't give you the date. I would say approximately 1950 and I am not sure about the account in Phyllis Kelley's name in Reno, whether that was closed in 1950 or 1952. [460]

Q. I think the records are here. I won't take time to look them up now. And, incidentally, there has been evidence here of Dr. Kelley depositing 55 thousand dollars in currency with a broker to purchase stock in June of 1950. Did you hear that testimony? A. Yes.

Q. You knew of that during the course of your

(Testimony of Robert Black.)

investigation, did you not? A. Yes.

Q. Did you also make an investigation to determine the date on which the action, which Dr. Kelley's first wife had filed against him in Nevada, was finally disposed and settled?

A. Again we would have those records in the files, yes.

Q. Isn't it true, Mr. Black, that it was shortly after that litigation was settled that the 55 thousand dollars in currency was deposited with the broker for stock? A. I can't say the date.

Q. I will show you plaintiff's Exhibit 125, Satisfaction of Judgment, showing it was filed May 16, 1950. Did you examine that document in the course of your investigation?

A. I have seen this before, yes.

Q. And you know, do you not, it was in June, 1950 the 55 thousand dollars was deposited with the broker in currency?

Mr. Maxwell: Objected to as calling for hearsay. It is in the record. [461]

Q. I call your attention to Exhibit 26 for identification, which appears to include some bank deposits slips of Wilson, Johnson & Higgins. Will you examine the first amount and date?

Mr. Maxwell: I will stipulate counsel is entitled to read any these exhibits to the jury at any time. No need to keep this witness on the stand.

The Court: That is true. This is cross-examination.

(Testimony of Robert Black.)

A. This deposit slip is dated June 21, 1950 in amount 55 thousand dollars in currency, plus other amounts.

Q. You had examined that in the course of your investigation too, had you not? A. We had.

Q. You testified, Mr. Black, that when you and Mr. Green had Dr. Kelley's patient cards in 1953, you transcribed information only from those cards on which you found a record of payments made in the years 1948 to 1952, is that correct?

A. Only those years, yes sir.

Q. Did you, on various cards, have difficulty in determining the year of payment?

A. Yes, on some cards we had some difficulty.

Q. In other words, you could find the month and date, but the year would be hard to determine, is that right?

A. Yes, that is correct in some cases, but we were able to determine by preceding and subsequent entry.

Q. In all instances you couldn't do that? [462]

A. I believe there were some instances that we couldn't tell that.

Q. Do these cards have both medical and financial information on the same card? A. Yes.

Q. And were many of these cards written in a small hand with closely packed writing?

A. I believe that is correct.

Q. Typical doctor's scribbling?

Mr. Brown: We object to that. He can't testify how a doctor scribbles it. I think that is testimony of Mr. Avakian. I realize he should have wide lati-

(Testimony of Robert Black.)

tude, but the testimony of the witness is saying little and Mr. Avakian is saying a lot.

Q. Mr. Black, the records which you used in trying to identify the income that was reported on returns consisted of what?

A. There was the duplicate slips. Records we used are transcriptions. We also used the receipt books, those that were available. In some cases it was necessary to refer to the records of collection agency to identify the particular basis for payment and in some cases, where we would have a record of income, which was otherwise unidentified, we were able to identify that by the patient himself who signed a check and identified it in that way.

Q. You testified that Dr. Kelley told you that he had a mortgage on his Ford automobile and that you made an inquiry about [463] that?

A. Yes, that is right.

Q. Where did you search for the record of that mortgage?

A. The Ford Agency, Richardson-Lovelock. I assumed at the time he had merely bought the car on credit. We found that that was not the case. I believe we also looked over title mortgages at the court house in Reno.

Q. Where else did you look?

A. That was all, I believe.

Q. Did you look for title mortgages in Carson City? A. No.

Q. Did it occur to you that title mortgages on automobiles might be recorded in Carson City, at

(Testimony of Robert Black.)

the State capitol? A. They might be recorded.

Q. I take it that didn't occur to you?

A. If it was in Reno, it would be recorded there. It could be recorded in Alaska, so far as I was concerned.

Q. You didn't want to make a trip there. Did you check, by any chance, the First National Bank, First & Virginia Branch, in Reno?

A. I believe we asked the bank for all their records pertaining to Dr. Kelley.

Q. Did you ask them if they had any title mortgage at any time on any automobile belonging to Dr. Kelley?

A. Well, I checked the records of the [464] bank. I don't recall going to the bank about Dr. Kelley. That is the usual procedure.

Q. You just overlooked mentioning it when I asked you to state where you had looked, is that it?

A. Yes.

Q. During the course of your investigation of this case, did you ever say to Dr. Kelley: "Doctor, there are some indications here that fees paid to you by these particular patients were not recorded. Can you help us find out whether they were or not, or give us any explanation?"

Mr. Maxwell: Objected to as argumentative.

The Court: Objection sustained.

Q. Did you ever discuss specific patient cards with regard to financial information with Dr. Kelley?

A. We discussed Mr. Green's card.

Q. That is the only one? A. Yes.

(Testimony of Robert Black.)

Q. When was it that you discussed Mr. Green's card?

A. That was the day in the doctor's office, the first time I seen Dr. Kelley, November 6th.

Q. This was after Mr. Green had taken the first batch of patient cards and then you were returning them together? A. That is correct.

Q. He took them alone the first time—at least, you weren't with him?

A. I wasn't with him when he picked them up.

Q. Do you remember what your discussion with the doctor was on Mr. Green's patient card?

A. As I recall, we asked him if all his cards were there and whether or not he destroyed or discarded any, and he told us he destroyed or discarded certain cards that he referred to as "no goods". Then we asked him specifically where Mr. Green's card was, and he replied that, "If it isn't in the file, it must have been misplaced."

Q. Was there any further discussion about Mr. Green's card?

A. I don't recall any about Mr. Green's card.

Q. With regard to these cards he said he discarded, so-called "no goods", isn't it a fact what he told you about this was that from time to time he cleaned out his files by discarding cards on patients whom he was sure would never be coming back again for any reason?

Mr. Maxwell: Objected to as argumentative and an attempt by counsel to testify.

The Court: Objection sustained.

(Testimony of Robert Black.)

Q. Then will you tell us what Dr. Kelley told you?

Mr. Maxwell: Objected to as asked and answered.

The Court: Objection sustained.

Mr. Avakian: I don't believe that was asked on cross-examination. I think that is all, except to cross-examine on Exhibits 127 and 130.

Mr. Maxwell: May I defer re-direct until [466] after counsel has completed?

The Court: I think that will save from duplicating.

(Jury admonished and recess taken at 4:05 P.M.)

Thursday, April 5, 1956.—10:00 A.M.

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand.

Mr. Maxwell: May it please the Court, before counsel begins his cross-examination, Mr. Black ran some tapes last night, I believe, on documents 127(a) and 130(a) in evidence and I would like to put in the record the correction on the totals at this time, if I may.

The Court: You may reopen for that purpose.

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, you have that information with you?

A. Yes, I made a note of it on the bottom of the exhibits.

(Testimony of Robert Black.)

Q. You had better point those notes on it. You shouldn't make any marks on the exhibit after it goes in evidence. That is 127(a).

A. These are the correct figures at the bottom.

Q. On the last page of each exhibit, is that right?

A. That is right.

Q. And which is dated 4-4-56?

A. That is right. [467]

Q. Can you give me the corrected totals in these various columns?

A. For the year under the stipulations column—

Q. \$1350.00?

A. That is correct. The next column, testimony, total is \$3211.

Q. That is \$50 off.

A. Under the patient card column for that year total \$7580.

Q. All right, continue.

A. And the fees identified column, \$1117 and under the fees not identified column, \$9,472.50. For the year 1950 we did not change any totals on the first column.

Q. Will you give the totals?

A. Under the stipulation column \$1760; under the testimony column, \$5553; patient card column, \$14,940.50; under the fees identified column \$5062; under fees not identified column, \$14,880.50. For the year 1951, under stipulations column, \$2,981.

Q. That is the same figure?

A. I guess that is. Under patient column, \$15,-

(Testimony of Robert Black.)

247.85; under fees identified column, \$5,559.04; fees not identified column, \$13,430.31.

Q. There was no additional figure for that year?

A. There was not, in this exhibit.

Q. All right, 1952 then? [468]

A. First column remains \$16,666.50; testimony column, \$2948; patient card column, \$8102.25, and the fees identified column, \$5693.13 and the fees not identified, \$4552.

Mr. Maxwell: Thank you, Mr. Black.

Cross Examination

Q. (By Mr. Avakian): Mr. Black, do the correction of the errors which you discovered last night result from errors in addition, or were there changes in the figures on the exhibit, or both?

A. Both, there were changes on the page and in addition. I had to have some help with this and I think there were two or three changes on the sheets. Thereafter I didn't make any further changes.

Q. In other words, some one who was helping you actually changed the figures on the exhibits themselves?

A. I believe the figures were added rather than changed.

Q. Can you tell us those items?

A. Mrs. Freda Cooper in 1949, final figure of \$5. That would be in the last column. I don't think that was in there originally. For the same person, 1950, \$13.50, I believe is addition; I don't believe in there originally.

(Testimony of Robert Black.)

Q. In which column, Mr. Black?

A. That is Mrs. Freda Cooper entry, in the patient column and fees not identified column.

Q. Thirteen dollars?

A. Thirteen fifty. For the year 1949, [469] also patient card column and fees not identified column. I have a note here there is also an addition in the identified column for the year 1952. I don't have the name here for that.

Q. What was the amount of that?

A. Ten dollars.

Q. You don't know what patient that was?

A. No, I don't.

Q. These are the only changes that were made on the face of the exhibits themselves, is that right, Mr. Black?

A. That is right.

Q. And these changes are included in the revised totals, is that right?

A. Yes.

Q. Were there other errors found, which were not entered on the exhibits? You said before you discovered it some one was helping you to enter these.

A. I didn't say there were errors. We didn't include all the items on the list. Sometimes items were left off.

Q. In other words, in checking last night you found you rexhibits were incomplete with respect to some small items?

A. Well, we didn't attempt to put in the small items.

Q. Who did this checking of the exhibits and

(Testimony of Robert Black.)

the finding of the correct amounts and correction of your additions?

A. I did some of it myself. Mr. William Beach, who is with the Internal Revenue Service, and Mr. Sam Beardsley. [470]

Q. There were three of you, in other words?

A. Yes.

Q. And then after you had made your examination, these exhibits were then delivered to Mr. Maxwell last night, is that right? A. Yes.

Q. Let me ask you a few general questions regarding these exhibits. You refer to the exhibits and I will refer to the blackboard. Would you tell us the nature of the entries which you entered in the column designated as stipulations?

A. Those were the figures that I took from my notes, the information from stipulates that had been offered.

Q. In other words, as to people to whom it was stipulated if they appeared they would testify to such and such an effect, you made notes of what their testimony would be if called, and those notes were the basis for the amounts entered in the stipulations column, is that right? A. Yes.

Q. What did you enter in the testimony column, what was the nature of the entries?

A. That was notes I took heretofore on the testimony of witnesses, with two exceptions, when I was out of the court for a few minutes and got the information from notes taken by Mr. Calkins and Mr. Green.

(Testimony of Robert Black.)

Q. So that the stipulations column represents people not here [471] personally, as to whom stipulations as to what they would testify have been entered, and the testimony column represents people actually here as witnesses? A. That is right.

Q. What did you enter in the column under the patient card here, pc?

A. That was information that was applicable if the column wasn't intended to be complete. We made an entry in that column only when there was a specific reason for it. "Px" in that column doesn't mean that there is no patient card. When we had some information regarding stipulation or the testimony, there is also some reason for making entry in the patient card column, we did that.

Q. What was the basis on which you decided whether to make an entry in that column or not?

A. In some cases the stipulation also referred to the fact that the doctor's records had the same figures and the doctor's records reflected the same income.

Q. In those instances you entered in the patient card column? A. Generally we did.

Q. That was your intent, at least?

A. That was our intent.

Q. Is that the only type of entry which you made under the patient card column?

A. No, generally the purpose of making entry under the patient [472] card column was when we had no information from witnesses or stipulations. In that case we picked up the amount that was

(Testimony of Robert Black.)

shown on our transcript of the patient cards.

Q. This second category then relates to patients who were neither present as witnesses or covered by stipulation, and in those instances you used your transcript of Dr. Kelley's patient cards to enter the amount in the patient card column, is that right?

A. Yes.

Q. Is your transcript of those things available here? A. Yes.

Q. Do you have it with you?

A. Yes, I do.

Q. Were there any other types of entry you made in the patient card column?

A. I notice here I have in some cases a memorandum entry in brackets which was amount reflected on our patient card transcript, even though we did have testimony of the particular witness.

Q. What was the basis for deciding to include those?

A. It was really a reference for my own use. It has no bearing on the column fees not identified, because in that particular instance we used the testimony of the witness.

Q. Now with respect to witnesses who were covered by either stipulation or testimony column, can you tell us, Mr. Black, [473] whether there are many instances in which your transcript of the patient card shows that the amounts are substantially the same amounts covered by the stipulation or testimony that were on the patient card, but you had not entered that on the exhibit?

(Testimony of Robert Black.)

Mr. Maxwell: Objected to—calls for speculation of the witness, particularly the use of the word “many.” If counsel would state specific instances, that is satisfactory, but to characterize it as “many” instances, we object.

Mr. Avakian: Let me rephrase it.

Q. You testified, where there was either testimony of a witness or stipulation as to testimony, as to amounts paid, if at that time we had not reached a stipulation in court that those amounts were shown on the patient card, that you entered in the patient card column that amount? Did I understand you correctly on that? A. Yes.

Q. Now my question is this—did your transcript of the patient cards indicate that in instances where there was a stipulation or testimony as to the amounts paid, without any stipulation in court as to what the patient card showed, that nevertheless the patient card did show the amount stipulated or testified to?

A. If I understand the question, you would like to know in instances where we picked up the information from the stipulation and testimony and there was no reference to the patient card, you would like to know whether our transcript of the patient [474] cards shows the same amount?

Q. Yes, that is right.

A. That I don't know. It would take quite a bit of time.

Q. What I am trying to get at—is your exhibit

(Testimony of Robert Black.)

intended to imply to the jury that if you had no entry on the patient card——

Mr. Maxwell: Objected to as argumentative. The exhibit speaks for itself.

The Court: Objection sustained.

Q. Does the absence of any entry in the patient card column mean that you found no entry in your transcript of the patient card for that year?

A. It doesn't mean that. We didn't make any attempt to tie in the patient card with these other entries if we were using the other information.

Q. If we may then come down to the other figures—take 1949 as an example, the total that you have for the patient card column is \$7590. Does that represent total amount of fees shown on the patient card, according to your transcript of the patient cards?

A. That figure really does not mean a thing.

Q. Now on this column, would you read the heading on the exhibit here?

A. Fees identified on return.

Q. What do the entries in that column represent?

A. They represent the identified reported income which we were able to locate that applies to that particular patient. [475]

Q. What material did you use in attempting to identify the fees for that particular patient?

A. We used the duplicate deposit slips, transcripts thereof; used the receipt books which were available. We used the collection agency records.

(Testimony of Robert Black.)

Q. Do you have your transcript of the duplicate deposit books with you?

A. Yes, I have it in the car.

Q. Can you tell us the nature of that information?

A. Yes. We transcribed each individual entry from the duplicate deposit slip on to an individual three by five card and filed them in alphabetical order.

Q. Do the duplicate deposit slips give listing of the checks or the clearing house of the check?

A. Yes, they do.

Q. Did the duplicate deposit slips also have writing alongside the check, and name?

A. Generally all of them did.

Q. Was that true always, or are there some instances where there was no name?

A. There were some instances where there was no name.

Q. Were these full names or the last names?

A. Just the last names generally. A few have first name.

Q. Do you know whether those names represented the name of the patient or the name of the person who signed the check? [476]

A. Generally it has the name of the person on it, some person who signed the check.

Q. How do you find that out?

A. Normally there was a reference to that in the doctor's records of patient cards. I think there might have been a few instances in the receipt

(Testimony of Robert Black.)

books, and we also had additional information on that when we circularized the patient.

Q. Did you make any inquiry of the doctor or Mrs. Kelley, directed toward identifying the names on the different deposit slips of any particular patient?

A. No, we didn't particularly ask them about that. We did ask about information on the different cards.

Q. As to particular patients, you mean?

A. No, we asked for patient cards we transcribed to recheck our figures. Since the doctor refused, I didn't want to ask them for information pertaining to particular cards.

(Answer read.)

Mr. Maxwell: That is not the answer.

A. When they refused to give us them, I did not ask for additional information.

Q. Did you state that Dr. and Mrs. Kelley refused to let you see the patient cards?

Mr. Maxwell: That wasn't the question.

The Court: Ask your question. If you can recall, let him answer as he recalls. [477]

Q. My question, I believe, was this, Mr. Black—did you take up with Dr. and Mrs. Kelley any particular names and make any inquiry in an effort to identify the names on the duplicate deposit slips of particular patients?

A. No, we did not ask for the information about any particular patient. We did ask that they re-submit their patient cards, and inasmuch as they

(Testimony of Robert Black.)

refused to resubmit those records, I did not think there was any sense in asking for any information about any particular patient.

Q. When was it that you asked them to resubmit their patient cards?

A. I believe we asked for that information at the time of the conference we had on February 4th. I believe I took it up with you once, possibly twice, since then. As I recall, the answer came not from the doctor himself, but from you.

Q. It was not Dr. Kelley who refused, but the answers came from me, is that right?

Mr. Maxwell: I believe the witness asked Dr. Kelley on February 4th.

The Court: Let the answer speak for itself. I don't want counsel, either one, to testify.

Mr. Maxwell: I don't want to testify. I would like very much to have the witness testify.

Q. Who made the refusal?

A. Whether we actually asked the doctor that question in the [478] conference on February 4th, I am not certain. I believe we did, but I couldn't swear to it.

Q. Did you ask me? A. Yes.

Q. When did you ask me?

A. Well, it was some time between February conference with the doctor and the June conference we had with you. It may have been at the June conference.

Q. You asked me in person or by letter?

A. I believe I wrote you a letter.

(Testimony of Robert Black.)

Q. Did I answer you by letter?

A. Yes, you did.

Q. Do you have that letter?

A. Not with me.

Q. Where is it? A. I think in the files.

Q. In the courtroom or building?

A. It is not in the courtroom. It may be in the building, I am not sure.

Mr. Avakian: Your Honor, simply as the basis for laying the foundation for offering copy of the letter, I would request the production of the original of the letter addressed by me, by air mail on March 4, 1954, to Mr. Robert Black, and if the original is not available, I will ask permission to offer copy in evidence, after showing it to the witness.

Mr. Maxwell: Why don't you let him look at the copy, counsel?

Mr. Avakian: I will be happy to.

The Court: Gentlemen, what is the delay?

Mr. Maxwell: May it please the Court, I have no objection as to the authenticity of those documents. I do have an objection as if at any time they are offered in evidence or used, I will have an objection. As far as the authenticity is concerned, I am very happy to have those used.

Mr. Avakian: May I have these two documents marked as one exhibit for identification, your Honor.

The Court: They will be marked defendant's Exhibit H-1 for identification.

Q. I am showing you Exhibit H-1 for identifica-

(Testimony of Robert Black.)

tion. Directing your attention first to the two-page letter, on top dated February 12, 1954, addressed to me, I ask you whether that is your signature on the second page? A. Yes, it is.

Mr. Maxwell: I will so stipulate, counsel.

Q. And as to the second document, the two pages of yellow paper, which appears to be a carbon copy of letter from me to you, is that copy of letter that you received from me?

Mr. Maxwell: I will so stipulate, counsel.

A. It appears to be a copy of the letter I received.

Q. And when you said you thought you may have written to me to [480] make a request for re-examination of the patient cards, does this refresh your recollection now that your letter of February 12, 1954 to me was the letter in which you made that request? A. That's right.

Mr. Avakian: I will offer these in evidence, your Honor.

Mr. Maxwell: Well now, your Honor, those documents are used to refresh his recollection, not impeaching.

The Court: Do you object to the offer?

Mr. Maxwell: Yes sir.

The Court: Objection sustained.

Mr. Avakian: I wonder if I could be heard on that. The testimony of the witness was that Dr. Kelley refused to permit a re-examination of his patient cards. Then there was the method—he thought the refusal came from counsel, and finally it devel-

(Testimony of Robert Black.)

ops, through his testimony, refusal came from me by letter. I think the letter itself is the best evidence of the refusal and his letter to me is the best evidence of the inquiry. I think it would be highly prejudicial to let his testimony stand without showing the actual communications made in both directions.

The Court: Counsel, testimony has been directed on cross examination and having been refreshed by the letter. It may stand.

Mr. Avakian: Then, your Honor, may I go into the details [481] of the letter through our inquiry and reply, so the full matter may be developed for refreshing his recollection?

The Court: You may through cross examination.

Q. Mr. Black, referring to these documents, to the extent necessary to refresh your recollection, would you state first of all whether, in your letter of February 12, 1954 to me, you made inquiry—

Mr. Maxwell: I will object to what counsel is doing, actually reading copy of the letter not in evidence, and further it would be argumentative, attempt of counsel to testify.

The Court: Well, I don't think counsel, through the back door, can come in over the Court's ruling. Whether this information, this answer is material, I can't say; so pursue on that point.

Mr. Avakian: I will your Honor, and I assure you I am not trying to circumvent the Court's ruling.

A. May I answer the question you asked a while

(Testimony of Robert Black.)

ago. While we were going through these accounts at the February 4th conference with Dr. Kelley, I noted where we definitely did ask him at that time if he would care to submit certain of his records and his answer at that time—your letter also refreshed my memory on that point—was that he didn't want to do that because he had had certain trouble getting his records back in the past.

Q. Isn't it a fact, Mr. Black, that while you and Mr. Green had the patient cards, from October to December 17, 1953, or whatever [482] the exact date was, that during that period Dr. Kelley made a request for an immediate return of his records because of certain action which the Treasury Department had taken against him?

A. He made such a request. At that time Mr. Green was in San Francisco, I don't know whether on a trial or military leave. Then I went away for a few days and the very day I returned I took the records to him.

Q. And that was approximately a week after my request?

A. I think less than a week; a maximum of six days. I think less than a week.

Q. Did I give any explanation to you as to why I did not want to give you the patient cards at that particular time that you made the request of me?

Mr. Maxwell: Object, if your Honor please. The question calls for a yes or no answer.

Q. That is all this question calls for.

(Testimony of Robert Black.)

The Court: The witness may answer.

A. I remember an explanation, as I recall with you from a telephone conversation.

Q. Was the refusal from me an outright refusal, or was it a statement that the request could not be granted at that time for certain reasons?

A. It wasn't an outright refusal.

Q. What was it then? [483]

A. You said—I think there are two conversations here—I think at one time you said that you could not submit the records at that time because you were having them audited by your auditors at the time. If I recall, perhaps later in telephone conversation, you said that you did not want the doctor's records given to us if they were going to be used the subject of the recircularization that might be damaging to the doctor's patients.

Q. Does examination of defendant's Exhibit F-1 for identification, which is my letter of June 14th, refresh your recollection as to whether this last statement you made was by telephone or by letter?

A. Yes, it does.

Q. And how was it?

A. Well, it says here, the question of——

Mr. Maxwell: We object to reading the document.

Q. The question is, was my statement to you made by telephone, as you stated you thought, or was it made by letter?

A. By letter, and I believe it was also by telephone.